INDEX

	Page
Statement, Rule XIII, Par. 4	1
Petition	3
Answer	10
Bill of exceptions	13
Motions for nonsuit by Government	78, 87
Argument	79, 85
Motion by plaintiff for direction of verdict	87
Motion by Government for direction of verdict	87
Opinion by Judge Bryant	88
Findings of fact and conclusions of law	92
Proposed findings of defendant	98
Government's exceptions	102
Plaintiff's exceptions	105
Judgment	106
Petition	108
Assignment of errors	109
Order allowing appeal	113
Notice of appeal	114
Citation	116
Exhibits	118

WITNESSES FOR PLAINTIFF

Helen Mahar Johnson—	
Direct	19
Cross	35
Redirect	41

Page

Judson Melius—
Direct 42
Cross 46
Earl C. Winsor—
Direct 50
Cross 57
Redirect 59
Recross 60
Redirect 61
George H. Brinkman—
Direct 61
Cross 65
Carl Conrow—
Direct 71
Erastus Hitchcock—
Direct 74
Cross 77

WITNESSES FOR GOVERNMENT

George W. Augustine—
Cross 15
Direct 16
Recross 17
Redirect 19
Raymond Mathias—
Direct 82
Cross 84

Page

PLAINTIFF'S EXHIBITS

Ex. 1. Insurance Policy. Identified Fol. 58. Received Fol. 58. Printed....118

Ex. 2. Paid check to Treasurer of United States. Identified Fol. 59. Received Fol. 59. See Photostat....135

Ex. 3. Provisional Receipt. Identified Fol. 60. Received Fol. 61. Printed....136

Ex. 4. Soldier's discharge of James P. Mahar. Identified Fol. 80. Received Fol. 80. Printed....137

Ex. 5. Communication received by Mahar, January, 1928. Identified Fol. 82. Received Fol. 82. Printed....140

Ex. 6. Death Certificate. Identified Fol. 86. Received Fol. 87. Printed....143

Ex. 7. Letter, dated March 1, 1928, from U. S. Veterans' Bureau, addressed to Frank C. Huntington. Identified Fol. 251. Received Fol. 253. Printed....145

GOVERNMENT'S EXHIBITS

Ex. 1. Application for group insurance. Identified Fol. 138. Received Fol. 142.

Ex. 2. Application for reinstatement. Identified Fol. 237. Received Fol. 244.

Ex. 3. Two premium account cards; receiving teller's register of the insurance premium receipt; two remittance listing receipts; premium notice form. Identified Fol. 258. Received Fol. 260.

Order allowing certiorari.... 185

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Defendant-Appellant,

vs.

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
Plaintiff-Appellee.

STATEMENT RULE XIII, PAR. 4

The above caption shows the proper style of the Court and title of this cause, the correct names of the original parties, and there has been no change in the parties. The dates of filing of the pleadings and other papers in the action with the Court Clerk are as follows:

Apr. 17, 1930—Petition under War Risk Insurance Act.

Aug. 6, 1930—Answer of sole defendant.

May 9, 1932—Case tried, Judge Frederick H. Bryant.

May 10, 1932—Trial continued.

Jan. 13, 1933 — Memorandum opinion of District Judge Bryant.

Mar. 9, 1933—Order extending term.

May 23, 1933—Findings of fact, conclusions of law, judgment.

Statement rule XIII, Par. 4

May 27, 1933—Marked defendant's requests to find.
June 3, 1933—Defendant's exceptions to Court's findings and refusals to find.

June 21, 1933—Plaintiff's exceptions to defendant's proposed findings.
Aug. 21, 1933—Defendant's petition for appeal, assignment of errors, order allowing appeal, notice of appeal and citation.
Sept. 20, 1933—Affidavit and order extending time to file and docket case.

The case was tried at a term of the District Court in Syracuse, May 9th and 10th, 1932, Hon. Frederick H. Bryant presiding, before a jury. Defendant's motions for dismissal and non-suit at close of plaintiff's evidence and at close of the case were denied. Both parties moved for a directed verdict in their favor and the Court dismissed the jury and reserved decision by the Court. Formal findings were made and judgment for the plaintiff for $5,000 entered May 23, 1933. Appeal by defendant was taken August 21, 1933.

The District Court, Northern Judicial District of New York, had jurisdiction of this action as provided in Sec. 445, Title 38, U. S. C. A., and by the same section the Circuit Court of Appeals, Second Circuit, has appellate jurisdiction herein.

PETITION

IN THE UNITED STATES DISTRICT COURT

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
Plaintiff,

against

THE UNITED STATES OF AMERICA,
Defendant.

The plaintiff, complaining of the defendant in the above-entitled action, and for a cause of action, alleges and shows to the Court:

First

That, heretofore and prior to the commencement of this action, the said James Patrick Mahar resided in the City of Oneonta, Otsego County, New York.

Second

That, on or about June 25th, 1917, at Albany, N. Y., the said James Patrick Mahar enlisted for military service in the United States Army; that, thereafter and on or about April 3rd, 1919, the said James Patrick Mahar was duly granted an honorable discharge from the United States Army, as a sergeant, first class, of Engineers; that, between June 26th, 1917, and April 3rd, 1919, the said James Patrick Mahar served as an enlisted soldier, and non-commissioned officer, and participated in the following battles, engagements, skirmishes and expeditions: Guillemont

Farm, Hindenburg Line, LaSelle River (St. Souplet), Jone De Mere Ridge, St. Maurice River, East Poperinghe Line.

10

Third

That during the said period of his said military service the said decedent, desiring to be insured against the risk of death and total permanent disability, applied for a policy of War Risk Insurance to be issued by the U. S. Government, through its duly constituted bureau, which was duly issued to him; that, the said insurance policy was duly maintained by the said James Patrick Mahar during his period of service in the U. S. Army, and, thereafter, so long as he was able financially to maintain the same and pay the premium thereon. On information and belief, that, thereafter, the said James Patrick Mahar failed to pay the premium thereon, and the said policy was allowed to lapse and the said insurance policy was lapsed for non-payment of premiums.

11

Fourth

Upon information and belief, that, thereafter, and on or before July 1st, 1927, the said James Patrick Mahar duly made application to the United States of America, through the United States Veterans' Bureau, for the reinstatement of a portion of his said insurance; upon information and belief, that, thereafter, and on or about September 19th, 1927, the United States of America issued to the said James Patrick Mahar, Government Life Insurance Policy No. K 812772 in the sum of five thousand dollars ($5,000.00), which became effective on July 1st, 1927; that, in accordance with the terms and pro-

12

visions thereof, the United States of America agreed to pay to the estate of the insured the sum of five thousand dollars ($5,000.00); that, thereupon, the said insured, James Patrick Mahar, agreed to pay to the United States Veterans' Bureau as the monthly premium upon the said insurance policy, the sum of three dollars ninety-five cents ($3.95); or in the alternative, the quarterly premium of eleven dollars eighty cents ($11.80); or in the alternative, the semi-annual premium of twenty-three dollars fifty-five cents ($23.55), or the anual premium of forty-six dollars sixty-five cents ($46.65). 18

Fifth

Upon information and belief, that on or before July 1st, 1927, the said James Patrick Mahar paid to the Treasurer of the United States the sum of thirteen dollars ninety cents ($13.90), and received therefor a receipt duly issued by the United States Government for that amount in full payment of insurance premium due on the said policy from July 1, 1927, to October 1st, 1927; that, thereafter, the said James Patrick Mahar paid all of the premiums upon the said insurance policy as they became due. 14

Sixth

That, thereafter, and during the month of September, 1927, the said James Patrick Mahar became ill and unable to work; on information and belief that the said James Patrick Mahar, during the month of September, 1927, and thereafter during the months of October and November, 1927, became impaired in both body and mind, so that he became and was continuously rendered physically and mentally unable 19

16 to follow any substantial or gainful occupation, including his occupation as car inspector, and continued so disabled both mentally and physically, so as to be unable to earn any money whatever and to follow any gainful occupation; upon information and belief, that the said James Patrick Mahar, during the months of September, October, November and a part of December, 1927, suffered from a progressive growth involving the gall bladder and its ducts of a malignant character which disabled him permanently; upon information and belief that the said James Patrick Mahar, during the months of September, October, November and December, 1927, was
17 totally and permanently disabled within the provisions of paragraph Eleventh of the said insurance policy.

Seventh

Upon information and belief, that thereafter and on or about December 24th, 1927, the said James Patrick Mahar died in the City of Oneonta, Otsego County, N. Y., as the result of such growth involving the gall bladder and its ducts and as the result of the causes of such disability. Upon information and belief, that from on or about September 1st, 1927, the
18 said James Patrick Mahar was disabled within the intent and meaning of paragraph Eleventh of the said insurance policy and that such disability continued from on or about that time until the date of the death of the said James Patrick Mahar, which occurred on or about December 24th, 1927.

Eighth

That, thereafter, and on or about January 18th, 1928, your plaintiff was duly appointed administrator of the estate of the said James Patrick Mahar by the Surrogate of Otsego County, New York, who, thereupon, duly issued letters of administration to this plaintiff, the Wilber National Bank of Oneonta, N. Y., which said letters of administration are still in full force and effect; that your petitioner, the Wilber National Bank of Oneonta, N. Y., has ever since acted and now is acting as such administrator of the estate of James Patrick Mahar, deceased.

Ninth

Upon information and belief, that all of the premiums which became due and payable in accordance with the terms and provisions of the said insurance policy have been paid by or in behalf of the said James Patrick Mahar, now deceased; upon information and belief that the said James Patrick Mahar was permanently and totally disabled during the months of September, October, November and the fore part of December, 1927; and that he became entitled to receive from the defendant under the terms of the said contract of insurance, all of the benefits to be derived therefrom in accordance therewith, including a refund of any and all premiums paid under the said insurance policy.

Tenth

That plaintiff, herein, has made due and timely proof of said disability to the defendant and also of the death of the said James Patrick Mahar, deceased.

and has demanded payment of all of the amounts due in accordance with the terms and provisions of the said policy, but that the defendant has disagreed with the plaintiff as to the claim for disability of the said James Patrick Mahar and in behalf of his said estate, and has wholly failed and refused to pay said sum or sums of money due under the said insurance policy, or any part thereof.

Wherefore, plaintiff prays judgment against the defendant in the sum of five thousand one hundred fifteen dollars ($5,115.00), being the amount due the estate of the said decedent at the rate of five thousand dollars ($5,000.00), for the death of the said decedent, and the further installments of twenty-eight dollars seventy-five cents ($28.75), per month from September 1st, 1927, to December 24th, 1927, and with proper legal interest thereon, together with an allowance for the payment of medical and other expenses incidental thereto, the costs incurred herein, together with such attorney's fees as the Court may find reasonable, not to exceed ten per cent of the amount of the judgment, and for such other and further relief as the plaintiff may be entitled to receive, herein, in the premises.

FRANK C. HUNTINGTON,
Attorney for the Plaintiff,
Office and P. O. Address,
Wilber National Bank Bldg.,
Oneonta, New York.

STATE OF NEW YORK,
County of Otsego,
City of Oneonta. } ss.

Edward Crippen, being duly sworn, deposes and says that he is an officer, to wit, the President of the Wilber National Bank of Oneonta, N. Y., the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDW. CRIPPEN.

Sworn to before me this 22nd day of
March, 1930.
JOHN M. HOTALING,
Notary Public,
Otsego County, N. Y.

ANSWER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

against

THE UNITED STATES OF AMERICA,

Defendant.

Law 1389

The defendant, United States of America, by Oliver D. Burden, United States Attorney for the Northern District of New York, for answer to the petition and complaint of The Wilber National Bank of Oneonta, N. Y., as Administrator of the Estate of James Patrick Mahar, Deceased, plaintiff herein, admits, denies, alleges, upon his information and belief, and respectfully shows to the Court, as follows:

1. The defendant denies the allegations of Paragraph numbered First of the said petition and complaint.

2. The defendant admits the allegations of Paragraph numbered Second of the said petition and complaint.

3. The defendant admits the allegations of Paragraph numbered Third, except as to the following, to wit, "and, thereafter, so long as he was able finan-

cially to maintain the same and pay the premium thereon", which allegation is denied.

4. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph numbered Fourth of said petition and complaint, and denies the same.

5. The defendant denies the allegations of Paragraph numbered Fifth of said petition and complaint.

6. The defendant denies all the allegations contained in Paragraph numbered Sixth of said petition and complaint.

7. The defendant is without knowledge or infor- to form a belief as to the allegationsmation sufficient as to the date of the death of said James Patrick Mahar, and denies the allegations contained in Paragraph Seventh of the petition and complaint.

8. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph numbered Eighth, and denies the same.

9. The defendant denies the allegations contained in Paragraph numbered Ninth of said petition and complaint.

10. The defendant admits that disagreements exist between the plaintiff and the defendant as to the defendant's liability under the alleged contract, which is the basis of said suit, and denies the other allegations contained in said Paragraph numbered Tenth of said petition and complaint.

11. The defendant denies that it is indebted to the plaintiff in the sum of $5,115.00 or any other sum, and denies that under the alleged contract and laws

applicable thereto, the defendant is liable for proper
34 legal interest thereon, or any part thereof, and is liable for an allowance for the payment of medical and other expenses incidental thereto, and is liable for costs of said action, or the allowance of attorney's fees therein.

Wherefore, the defendant demands that said petition and complaint be dismissed with costs as against the plaintiff.

UNITED STATES OF AMERICA, Defendant,
By OLIVER D. BURDEN,
United States Attorney for the
Northern District of New York.

35

NORTHERN DISTRICT OF NEW YORK,
State of New York,
County of Onondaga. } ss.

Oliver D. Burden, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters stated to be alleged upon information and belief and as to those matters he believes it to be true.

That the reason this affidavit is made by deponent
36 and not by the plaintiff is that the plaintiff is a corporation sovereign and acts through its officers and agents, and that deponent is such officer, to wit, the United States Attorney in and for the Northern District of New York. That the sources of deponent's knowledge and the grounds of his belief as to matters alleged upon information and belief are communi-

cations of the proper officers and agents of the Government in the hands of deponent.

OLIVER D. BURDEN,
United States Attorney.

Sworn to before me this 31st day of July, 1930.

B. F. TOMPKINS,
Notary Public.

BILL OF EXCEPTIONS

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

against

THE UNITED STATES OF AMERICA,

Defendant.

Law No. 1389

Minutes of proceedings at a Special Term of the Court at Syracuse, N. Y., May 9th, 1932.

Presiding: Hon. Frederick H. Bryant, U. S. District Judge.

APPEARANCES:

Frank C. Huntington, Attorney and Counsellor at Law, Oneonta, New York, Attorney, and George L. Bockes, Esquire, Attorney and

Counsellor at Law, Oneonta, New York, of counsel, for the plaintiff;

40 Honorable Oliver D. Burden, United States Attorney in and for the Northern District of New York, Federal Building, Syracuse, New York, by Joseph San, Esquire, Insurance Attorney, and William A. Gillchrist, Esquire, Assistant Insurance Attorney, Washington, D. C., and B. Fitch Tompkins, Esquire, and Henry R. Follett, Esquire, Assistant United States Attorneys, Northern District of New York, of counsel, for the Government, defendant.

A jury was called, examined and sworn. Attorney
41 Frank C. Huntington made the opening statement for the plaintiff and B. Fitch Tompkins, Assistant U. S. Attorney, made the statement for the defendant.

Mr. Tompkins: We have a witness here, a doctor and a very busy man, who made an examination and certified at the time this policy was converted.

He does not remember much about it, except the written examination, and the plaintiff's attorneys are willing to consent that that examination be read with the same force and effect as though the doctor was here, took the stand and testified to it.

42 In view of that I want to let the doctor go home and with the consent of the plaintiff's counsel and with that understanding, I want to discharge the witness at this time.

The Court: Is that satisfactory to you?

Mr. Bockes: Yes, sir; it is, your Honor.

The Court: Very well, you may discharge your

witness, Mr. Tompkins.

Mr. Bockes: I will now call Mrs. Johnson.

The Court: The witness will come forward and be sworn.

Mr. Bockes: Just a minute, please.

(Conference between counsel.)

Mr. Tompkins: If your Honor please:

Now plaintiff's counsel would like to have us swear the doctor out of the order, and then he will stipulate the paper.

He wants to ask one question or so. I understood he was willing to take the paper without the witness being called.

The Court: I will let you, if you prefer, take one of the defendant's witnesses out of order at this time, if you prefer to do that, and if you consent to it.

Mr. Bockes: It is just one question and the witness can be sworn and then disposed of.

The Court: Very well, call your witness.

Mr. Tompkins: Doctor Augustine.

GEORGE W. AUGUSTINE, called as a witness on behalf of the defendant, out of order, and being duly sworn, testified as follows:

Cross examination by Mr. Bockes:

Q. Doctor, are you a resident of the City of Oneonta? A. I beg your pardon?

Q. Do you live in the City of Oneonta? A. Yes, sir.

Q. And you have been a resident of the City of

Oneonta for how long? A. Twenty years, about.

46 Q. And how long have you been a practicing physician and surgeon? A. Thirty-three years.

Q. I show you the record of the death of James P. Mahar and I will let you pronounce the names of the causes of death; what are they as stated in that record? A. Chronic inflammation of the gall bladder and its ducts and pulmonary embolism.

Q. Now, with respect to the first two: In your opinion, would they imply some weeks of sickness before the hospitalization and death? A. They might and probably they did.

Mr. Bockes: That is all.

47 The Court: Now, that, as I understand it, is to be taken in addition to his testimony which will be read later?

Mr. Bockes: Yes, sir.

Mr. Tompkins: But we will reserve that, the witness's examination of the decedent until later.

Mr. Bockes: Yes.

Direct examination by Mr. Tompkins:

Q. Doctor, was the condition of the gall bladder as it is reported in this death certificate, a disease which could be in any sense termed a total or permanent disability? A. Yes; a total disability at times,

48 of course.

Q. But, in the sense of permanent, what do you say? A. I do not think anyone could give you any opinion on that.

Q. In other words, such a condition is terminable, or capable of being treated by operation, or otherwise arrested? A. Yes, sir; it is.

Q. And usually successfully? A. Yes, sir.

Q. And the other condition given for death, as set forth in there, was what, in common language, Doctor? A. Well, I should call it an accidental surgical death caused by some foreign material, probably a clot, entering the blood stream and lodging at some vital or fatal area, such as the lung or the brain.

Q. Was it a condition in and of itself, or one that was brought about by reason of the operation? A. Undoubtedly brought about by reason of the operation.

Q. And is such a condition often the result of anaesthesia or the operation connected with a condition of that kind? A. Not uncommon.

Q. What? A. It is not uncommon.

Q. You personally did not attend this deceased? A. No, sir; I did not.

Q. And a part at least of your examination which was made in July of this Mr. Mahar, was set forth in the written examination made by you? A. Yes, sir.

Q. And you found him in good health? A. In good health.

Q. And insurable? A. And insurable; yes, sir.

Mr. Tompkins: That is all.

Recross examination by Mr. Bockes:

Q. Now, at that time you stated in your report there that you considered him a first-class risk; did you not? A. Yes, sir; I did.

Q. And did you see anything to excite any sus-

picion that he was not a first-class risk? A. Well,
52 I know that he was so far as I could tell by an examination such as I am accustomed to make.

Q. That he was at that time? A. Yes, sir.

Q. Did you give him the ordinary examination that you ordinarily and usually do to applicants for life insurance? A. Yes, sir.

Q. Now, Doctor, I think you told me that for a few weeks previous to his death he might have been disabled by this disease mentioned in the death certificate? A. He may have been and very probably was.

Q. And so would it be in your opinion entirely
53 possible that he was disabled from, say, the middle of September, to the time of his death on December twenty-fourth?

Mr. Tompkins: I object to that as speculative and incompetent, immaterial and irrelevant.

The Court: Overruled. I will let him answer if he can answer it.

Mr. Tompkins: An exception.

By Mr. Bockes:

Q. The Court says you may answer? A. What is the question?

Q. The stenographer will read it to you.

54 (The stenographer repeated the question as follows:

"Question: And so would it be in your opinion entirely possible that he was disabled from, say, the middle of September, to the time of his death on December twenty-fourth"?)

A. Yes, sir; possible.

Mr. Bockes: That is all.

The Court: But you do not know anything about his condition? 55

The Witness: Not the first thing.

Redirect examination by Mr. Tompkins:

Q. You mean by "disabled" that the patient was probably sick? A. Pardon me?

Q. You mean by "disabled" that the patient was probably sick? A. Oh, he must have been; yes, sir.

HELEN MAHAR JOHNSON, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows: 56

Direct examination by Mr. Bockes:

Q. Where do you reside, Mrs. Johnson? A. Gilboa.

Q. Where did you reside at the time of the death of James P. Mahar? A. Four East End Avenue, Oneonta.

Q. Was he your husband? A. Yes.

Q. When did he die? A. December the twenty-fourth, 1927.

Q. Leaving you as his widow and some children? A. Yes, sir. 57

Q. How many children? A. Three.

Q. What were their ages at the time of his death, or about their ages at the time of his death? A. Mary was born the fourth of August, 1920; Lillian was born the eighteenth of June, 1922, and James

was born the twenty-second of May, 1927.

58 Q. And after the birth of the last child did he do something about increasing his life insurance? A. He reinstated this government life insurance.

Q. I will show you a paper and I ask you if that is the policy which he received? A. Yes, sir; it is.

Mr. Bockes: That I offer in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Insurance policy received in evidence and marked Plaintiff's Exhibit Number 1, of this date.)

By Mr. Bockes:

59 Q. Did you also find among his papers a paid check to the Treasurer of the United States? A. Yes, sir; I did.

Q. For thirteen dollars and ninety cents? A. Yes, sir.

The Court: For how much?

The Witness: Thirteen dollars ninety cents.

Mr. Bockes: And that I offer in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Paid check to Treasurer of the United States for $13.90, received in evidence and marked Plaintiff's Exhibit Number 2, of this

60 date.)

By Mr. Bockes:

Q. I show you another paper, marked "provisional receipt", and I ask you if that arrived soon after he sent the check? A. Yes, sir; it did.

Mr. Bockes: I offer that in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Provisional receipt received in evidence and marked Plaintiff's Exhibit Number 3, of this date.) 61

The Court: What is the date of it?

Mr. Bockes: This says payment received July 29, 1927.

By Mr. Bockes:

Q. I show you a postoffice money order and I ask you if that is connected with this insurance in any way? A. Yes; that was the premium for November.

Mr. Tompkins: What did the witness say it was for? 62

Mr. Bockes: She said it was for the premium for the month of November, and I offer it in evidence.

Mr. Tompkins: I object to it and ask that it be stricken out; that is not a fair statement.

The Court: Yes; the answer may go out, that it is a payment for November.

Mr. Tompkins: I suggest you see what she knows about it first.

Mr. Bockes: Very well.

By Mr. Bockes:

Q. I will ask you, Mrs. Johnson, just what you know about this paper that I just showed you, this post-office money order receipt? A. That was the amount of money that was to be sent to the government. 63

Mr. Tompkins: I object to that and ask that it go out.

The Court: That may go out.

64 By Mr. Bockes:

Q. Who sent it in to the government; you or your husband? A. I sent it in.

Q. You did, yourself? A. Yes, sir.

Q. And to whom did you send it? A. To the treasurer of the United States.

Q. To the treasurer of the United States? A. Yes, sir.

Q. Any letter or letters go along with it? A. No, sir.

Mr. Bockes: I offer that in evidence.

Mr. Tompkins: I object to it as not properly identified and not enough to show itself what it is;

65 it is just a stub for a money order.

The Court: Let me see it, if you will?

(Same handed to and examined by the Court.)

The Court: Objection sustained.

I think you better examine her further on that; get more details about it.

Mr. Bockes: An exception.

By Mr. Bockes:

Q. What, if anything, did you send along with your post-office money order to the treasurer of the United States? A. What is it?

Q. The stenographer will repeat the question.

66 (The stenographer repeated the question as follows:

"Question: What, if anything, did you send along with your post-office money order?")

A. We generally had these notices.

Q. No; on this particular occasion of November second, 1927? A. I don't remember whether we

received one for this or not.

Q. How did you send it; in an envelope? A. Yes, sir. 67

Q. And what else was there in the envelope besides your postoffice money order, if anything? A. Nothing; I don't think there was a thing in it, only the money order.

Q. Had you received any statement from the government of premium due or anything of that sort that you attached to it? A. I don't remember whether we did or not, but I knew that these monthly payments were due and that is the reason I sent it.

Mr. Tompkins: I move to strike that out.

The Court: That may go out. 68

Mr. Tompkins: As a conclusion.

The Court: It may go out.

By Mr. Bockes:

Q. Well, later on did you send in to the Treasurer of the United States another postoffice money order for three dollars and ninety-five cents? A. Yes, sir; I did.

Q. And when was that? A. In December, 1927.

Q. In the meantime had the first postoffice money order come back to you? A. No, sir.

Q. What happened to the second postoffice money order? A. It was put in the envelope and 69 sent to the Treasurer of the United States.

Q. And did the proceeds of that, or the postoffice money order, ever come back to you? A. No, sir; it did not.

Q. Was your name written on the envelope, or Mr. Mahar's name? A. Mr. Mahar's name was

written on the outside of the envelope.

70 Q. In both cases? A. Yes, sir.

Q. Give his street number and address? A. Four East End Avenue; yes, sir.

Q. Four East End Avenue, Oneonta? A. Yes, sir.

Q. How was his name written? A. James P. Mahar.

Q. James P. Mahar? A. Yes, sir.

Q. Just as it was written on this policy? A. Yes, sir.

Q. And I believe you said that this second payment of three dollars and ninety-five cents, or the December payment of three dollars and ninety-five

71 cents was never returned to you in any way? A. No, sir; it was not returned.

Mr. Bockes: Now, I renew my offer to put the postoffice money order receipt in evidence in view of the testimony that James P. Mahar's name was written on the corner or outside of the envelope.

The Court: You went to get these two orders you testified about?

The Witness: Yes, sir.

The Court: And when you received them did you receive any receipts from the postmaster?

72 The Witness: These two money orders?

The Court: Yes.

The Witness: Just the stub.

The Court: Just the stubs?

The Witness: Just the stubs; yes, sir.

The Court: And these are the stubs you got at that time?

The Witness: Yes, sir.

Mr. Tompkins: I object to it as incompetent and immaterial.

73

The Court: Where is there any materiality in it? That is no proof. She testifies that she sent them; this does not add to that in any way, does it, any more than possibly to fix the dates. I do not assume there will be any dispute that these orders were made by her and mailed as she has testified here.

I will sustain the objection at this time and if it becomes material a little later in the case I will allow you to renew your offer.

For the present, objection sustained.

Mr. Bockes: I find here now a letter from George E. Agan, assistant director, with reference to these payments, and so I will waive this proof by her.

74

Now, while we are at it, I will offer that in evidence right now, a letter from the United States Veterans Bureau, dated March twenty-first, 1928, to Frank C. Huntington.

(Same shown to and examined by Mr. Tompkins.)

Mr. Tompkins: Well, I object to the offer; the letter now offered is a letter addressed to Mr. Huntington and not to the witness.

Mr. Bockes: This is relative to the payment of the premiums.

75

The Court: May I look at that?

Mr. Bockes: Yes, sir.

(Same shown to and examined by the Court.)

The Court: I do not believe we ought to put all of this letter in evidence.

As I understand, the purpose of it is to show, it

is really to corroborate this witness in her testi-
76 mony that a payment of three dollars and ninety-
five cents was made in November and a payment of
three dollars and ninety-five cents sent in Decem-
ber; that is the purpose of it?

Mr. Bockes: That is the purpose of it, your Honor.

The Court: Well, I presume from this letter and the testimony of this witness that there will be no dispute on that. Am I correct in that?

Mr. Tompkins: I do not know about that. I cannot quite agree with your Honor. I think that letter there was written by an official who did not
77 receive it and I think he is passing on the claims that Mr. Huntington made about their being payments of premiums and so forth.

The Court: I will sustain the objection at this time. I say it is possible that I will reverse my ruling as the case develops a little further.

Mr. Bockes: Nearly three weeks ago, or over two weeks ago, anyway, Mr. Huntington served on government counsels a demand to produce books showing the receipt by the government of all sums of money paid by James Patrick Mahar as premiums or otherwise upon this policy, and if they have complied with that request, they should have said so,
78 and they should have produced the records.

Mr. Tompkins: If your Honor please: I have the files here, but I do not know where to put my hands on that record, if it is in the files here, and Mr. San, who expects to be here on the trial, probably can do it, and he had notice of this demand and I think he can do it.

Now, while we are willing to produce all we have got, I do not like to be put in the position of having that letter reviewing the claim made by Mr. Huntington received in this way; I do not believe the government ought to be bound by that recital and especially in the form in which it was made there. 79

The Court: Well, this witness has already testified positively to these payments. Now, if I were to allow you later in the case, if they are attacked in any way, to renew your offers to corroborate, won't that cover your purpose at that time?

Mr. Bockes: Yes; it will, very well, your Honor.

The Court: Very well. Proceed.

By Mr. Bockes:

Q. Is this paper which I now show you, the soldier's discharge of James P. Mahar? A. Yes, sir; it is. 80

Mr. Bockes: I offer it in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Soldier's discharge of James P. Mahar received in evidence and marked Plaintiff's Exhibit Number 4.)

By Mr. Bockes:

Q. Now, how was mail delivered at your house, Mrs. Johnson, by the regular mail carrier? A. By the regular mail carrier; yes, sir. 81

Q. And who got the mail; you or somebody else in the family? A. I got it.

Q. Always? A. Yes, sir.

Q. Now, from the time that the policy was received, were there any communications came to your

82 house, to your knowledge, concerning this insurance until along after his death? A. No, sir; there were not.

Q. And I show you a communication and I ask you if that is the first one ever received at your house through the mails or otherwise after the policy arrived? A. Yes; that came in January.

Q. 1928? A. 1928.

Mr. Bockes: I offer it in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Communication received by Mahar in January, 1928, received in evidence and
83 marked Plaintiff's Exhibit No. 5, of this date—consisting of two sheets.)

By Mr. Bockes:

Q. And when was the next communication received at your house relative to this policy? A. Just about the first of March.

Q. 1928? A. 1928.

Q. And is this the communication? A. It is.

Mr. Bockes: I offer this communication in evidence.

Mr. Tompkins: I object to it as immaterial and it appears to be in March, 1928, after this whole af-
84 fair had terminated and it seems to me to be immaterial.

The Court: May I see it?

Mr. Bockes: Yes, sir.

(Same shown to and examined by the Court.)

Mr. Tompkins: Mr. Mahar died in December, 1927, and this is something along in March, 1928.

Mr. Bockes: It bears upon the question of whether the government by accepting premiums in November and December and sending a statement in January and again in March and April, did not create such a state of facts whereby they kept this policy alive independent of any question of lapse. 85

The Court: Now, may I see the exhibit that you introduced just before this.

Mr. Bockes: Yes, your Honor.

(Same shown to and examined by the Court.)

Mr. Bockes: I am not offering this upon the theory that the government has estopped itself as a matter of law from interposing its defense; not at all upon that theory; but upon the question of whether there is not a question of fact created here by the acts of the government in taking the November payment and the December payment and in sending notices in January and March and April that kept this policy alive as a question of fact. 86

The Court: I am going to sustain the objection to the offer of the letter that was received in March.

Mr. Bockes: And an exception, please.

By Mr. Bockes:

Q. And is this a record of your husband's death certificate? A. Yes, sir; it is.

Mr. Bockes: I offer that in evidence.

Mr. Tompkins: No objection. 87

The Court: Received.

(Death certificate received in evidence and marked Plaintiff's Exhibit Number 6, of this date.)

By Mr. Bockes:

Q. After your husband's death, did you have the

88 Wilber National Bank of Oneonta, New York, appointed as administrator? A. Yes, sir.

Q. And they are still acting as such? A. Yes, sir.

Q. Now, going back to an earlier time: When did you marry Mr. Mahar? A. September fifth, 1919.

Q. And what was his condition of health at that time? A. Very good.

Q. How long did it continue good? A. It continued until in September, 1927.

Q. And what did you observe about his change in condition of health in September, 1927? A. Well, 89 his yellow color and he neglected his work around the house.

Q. What kind of work did he neglect? A. Emptying ashes and carrying coal and attending to his garden.

Q. And what, if anything, about financial affairs? A. Why, he left those and I had them to attend to myself then.

Q. Up to that time had he always taken care of them? A. Yes; he had.

Q. Did he have other insurance? A. Yes, sir.

Q. What did he do about that, the payment of 90 premiums on that? A. I attended to that, the railroad insurance——

Mr. Tompkins (Interrupting): What period is this if I may inquire.

The Court: In September, 1927, as I understand it.

Mr. Bockes: Yes.

By Mr. Bockes:

91 Q. Can you fix the time more definitely in September when this occurred? A. About the middle of September.

Q. Up to that time had he taken care of all financial affairs? A. Yes, sir; he had.

Q. And after the middle of September did he take care of any? A. No, sir.

Q. What about the payment of bills to storekeepers and so on? A. I had to do that myself.

Q. And continuously after the middle of September? A. Yes, sir.

Q. Had you done any of that before the middle of September? A. No, sir.

92 Q. What facts or events led up to your sending in three dollars and ninety-five cents to the treasurer of the United States on November second, 1927? A. I talked with him about it and he said to send it in.

Q. What, if anything, was said about it; what it was for and so on? A. Well, just that it was the premium that was due on that insurance.

Q. And anything said about anything being back on it at that time? A. No, sir.

Q. Did you know that there had been any duns or any claims that back premiums were due and payable? A. No; there had not been. 93

Q. Were they paid up so far as you knew? A. As far as I knew, they were.

Q. And had there been any communications of any kind, to your knowledge, relating to this insurance, after the receipt for the thirteen dollars and ninety cents and the receipt of the insurance

policy? A. There had not been any that I knew of.

94 Q. Now, counsel suggests that you give more details of what you observed about his actions after the middle of September, or lack or actions, different from his conduct theretofore? A. Well, before he had always done the chores around the house and carried the coal and his ashes and everything like that, and attended to his garden.

Q. Did he do any work whatsoever after the middle of September around the house? A. No, sir.

Q. Either physical or mental? A. No, sir.

Q. And you have already said that his eyes looked yellow? A. Yes, sir; he had a yellow color.

95 Q. And what else did you notice about his physical condition? A. He lost weight and he would sit around the house and he wouldn't do things he had done before.

Q. Had you had a family physician for a number of years? A. Yes, sir; Doctor Winsor.

Q. Did he have some talk with Doctor Winsor in September? A. Yes, sir; he saw him on the street in Oneonta.

Q. About what time in September was that? A. About the middle of September.

Q. What complaints did your husband make
96 about his health after the first of September?

Mr. Tompkins: To her?

Mr. Bockes: What is it?

Mr. Tompkins: You mean complaints made to her?

Mr. Bockes: Well, yes, complaints made to her; yes.

By Mr. Bockes:

Q. Do you remember anything he said about his health? A. Why, he didn't feel good and he told the doctor if his health did not improve he was coming up to see him. 97

Q. Did you make any efforts to get him to go to the doctor? A. Yes, sir; I tried to get him to go to the doctor in September.

Q. And when did he finally actually interview the doctor for examination, as you understand it? A. October the seventeenth.

Q. And that was about the time he quit work? A. Yes, sir.

The Court: September? 98

The Witness: Of October.

The Court: October?

The Witness: Yes, sir.

By Mr. Bockes:

Q. Now, for the purpose of refreshing your recollection I will ask you whether he did not say that he thought it was simply jaundice and he could shake it off, or words to that effect? A. Yes, sir; he did.

Q. From that time on just tell what happened to him with respect to his seeing doctors and whether his health got better or worse, or continued the same? You do not need to have me ask you questions about everything. You just go ahead and give a little history to the jury of what happened to your husband from the middle of September on with reference to his health? A. He kept going down hill all the while until October and then he went to the doctor and he did not work any after that. 99

Q. Did he get any better after that? A. No,

sir; he kept getting worse all the while.

100 Q. Did he do any work of any kind? A. No, sir.

Q. Did he do any work of any kind that you saw after the middle of September; that you saw? A. No, sir; he did not.

Q. Now, who worked with him at his shop, or whatever it was? A. Mr. Melius and Mr. Hitchcock.

Q. Was there somebody who was a near-neighbor who drove back and forth with him to work? A. Mr. Hitchcock.

Q. Mr. Hitchcock? A. Yes, sir.

101 Q. What was your husband's work? A. Car inspector.

Q. For the Delaware and Hudson Company? A. Yes, sir.

Q. And how long had he been engaged in that work? A. He worked as car inspector about four years.

Q. And who was his foreman on that job? A. Mr. Melius.

Q. And he is here in court? A. Yes, sir.

Q. And how often did he see the doctor after this time in October you speak of? A. He saw him every week at least.

102 Q. And then finally in the early part of December they took him to the hospital? A. Yes, sir.

Q. Before that was there some council or conference between doctors? A. There was Doctor Brinkman of Oneonta.

Q. He consulted with Doctor Winsor? A. Yes; he consulted with Doctor Winsor.

Q. Over your husband's health? A. Yes, sir.

Q. Until he stopped working with the Delaware and Hudson Company, what were your husband's hours of work? A. From three to eleven. 103

Q. And until the eighth of September, what was his work for the D. and H.? A. Car inspector.

Q. What was it after that and up until he quit work? A. Well, they transferred him down to the hump where he just had to mark the cars, instead of working on them, making the repairs on them.

Q. And when did the doctors finally take him to the hospital? Was it in the early part of December? A. Yes, sir; I do not remember the exact date.

Q. And after a few days they operated on him and he died? A. Yes, sir. 104

Q. Now, what did you do about presenting a claim after his death for the amount of the insurance and for compensation for the time he was disabled? A. Well, that policy was turned over to Mr. Huntington and he sent in for the application, or for the forms, whatever it was that was necessary to do.

Q. And no part of this insurance or compensation has ever been received? A. No, sir.

Mr. Bockes: I think that is all.

Cross examination by Mr. Tompkins:

Q. The insurance under this policy is not to be received by you; is it, Mrs. Johnson? A. No, sir. 105

Q. Now, the policy is payable to his estate; is it not? A. Yes, sir.

Q. And so you would not receive it; you are not the administrator, are you? A. No, sir.

Q. When did you first see this policy, Exhibit 1,

if you can recall? A. When he brought it home after
106 he received it in September, 1927.

Q. In September? A. Yes, sir.

Q. Do you remember what day in September it was? A. I think it was September the seventeenth.

Q. Did you look at plaintiff's Exhibit 1; did you examine the policy? A. Yes, sir.

Q. Did you notice it called for a payment of three dollars and ninety-five cents the first day of each month? A. Yes, sir.

Q. You had never sent in any premium, that sum of three dollars and ninety-five cents, the first of July; had you? You never sent it in; did you? A.
107 No, sir; he sent that himself.

Q. He did? A. Yes, sir; he sent the check and that covered it.

Q. The thirteen dollar and ninety cent check? A. Yes, sir.

Q. But that was given at the time this policy was issued? A. Yes, sir.

Q. To clear it up and get this new policy? A. Well, I supposed so; yes.

Q. This is not the policy he originally had? A. No, sir.

Q. This is a new one dated the first day of July,
108 1927? A. Yes, sir.

Q. And this thirteen dollars and ninety cents, the check, was sent on application for this particular policy; was it not? A. Yes, sir; it was.

Q. And so far as you know and until at least the second of November, this three dollars and ninety-five cents monthly premium had not been paid since

the policy issued; was it? A. I supposed it had been paid.

Q. Well, so far as you knew, it had not been paid? A. So far as I knew it had been paid.

Q. So far as you supposed? A. Yes, sir.

Q. You did not know anything about it then? A. No, sir; I did not; not at that time.

Q. Now, how did you come to send in the three dollars and ninety-five cents in November? A. I talked it over with Mr. Mahar and he said that was the amount that was due and for me to send it in.

Q. Was the first day of November mentioned or anything of that kind, that you recall? A. I do not remember that.

Q. Do you know why you sent it on the second day of November rather than the first day of November? A. No, sir.

Q. What kind of an envelope did you put this money order in that you say you sent to the Treasurer of the United States? Was that to whom you say it was addressed? A. Yes, sir.

Q. Did you address the envelope yourself? A. Yes, sir; I did.

Q. Where; at your home or at the postoffice? A. At the postoffice.

Q. And you had never had any notices of premiums, so far as you knew; you never had seen any notice of premium from the government as to the premium being due, the amount of the premium to be paid; you had not seen any notice as to the amount and so forth? A. No, sir.

Q. You had, though, read this policy and you knew that it called for it? A. Yes, sir.

Q. Now, when do you claim you sent in the second premium, or did you send in the second premium? A. Yes, sir.

112

Q. When? A. In December, 1927.

Q. What time in December, if you remember; did you send it on the first day of December? A. No, sir; I did not.

Q. Did you send it on the second day of December? A. I do not remember that.

Q. Well, would it refresh your recollection to looks at these stubs, when you paid for the money orders, or obtained the money orders? A. Yes, sir.

Q. I show you these money order stubs and ask you to tell me. A. That was December the twentieth.

113

Q. And so that the premium which you claim was due the first day of December was sent December the twentieth? A. Yes, sir; it was.

Q. And what condition was Mr. Mahar in at the time you made this first remittance? First, you say you made this first remiittance on the second of November? A. Yes, sir.

Q. And what was his physical condition then? A. Very poor.

Q. Sick at home? A. Yes, sir.

Q. And was that the reason you happened to have him pay this premium? A. No.

114

Q. Was that the reason, because he was sick at home? A. No, sir; but because I had charge of all those things to pay and that was included with them.

Q. Well, as I recall, you told the jury here a

while ago that Mr. Mahar began to fail in his memory and especially as to financial matters in September and that you took over matter along about that time? A. Yes, sir; but I always talked with him about these things as I sent them in. 115

Q. And when the first of October came around did you talk with him about paying the premiums due the first of October? A. No, sir; I supposed it had been paid, the first of October.

Q. Well, I thought you said you took it over in September and was running the financial affairs from September on; that he did not pay, or was not paying any attention to his financial affairs? Now, this is October I am speaking about now; this is a month later. Now, can you give me any reason why you thought of it on the first of November and did not think of it on the first of October? A. No, sir. 116

Q. Well, he was not quite so well on the first of November as he was on the first of October, was he? A. No, sir.

Q. In other words, he was a little worse; wasn't he? A. Yes, sir; he was.

Q. Mr. Mahar, so far as you knew, was working during the month of September? A. Yes, sir.

Q. That is, he went out in the morning and came back at night? A. Yes, sir.

Q. And he rode, as you say, with his friend down to the shop most of the time? A. Yes, sir. 117

Q. And how long in October did he continue to do that? A. Until the seventeenth of October.

Q. Did Mr. Mahar have other kinds of health or sickness insurance during this time? A. Yes, sir.

Q. Do you know whether he ever made any

claim for payment on this health insurance? A. No, sir; I do not know.

118 Q. Did you know, as a matter of fact, that he was covered by a blanket policy issued through his employment with the railroad company for health? A. Yes, sir; I did.

Q. Did you know that he did receive benefits before he died from this, or through this company and the railroad company's representative? A. Yes, sir.

Q. As a matter of fact, one of his friends, the foreman, made the payments to him; didn't he? A. Yes, sir.

119 Q. Did you know anything about his making a claim for that health insurance, this other insurance through the railroad? A. The railroad insurance, you mean?

Q. Yes. Did you know anything about his making that claim? A. I supposed that the railroad employees had to be insured.

Q. Yes, I know, but I am simply asking you whether you knew anything about his making that claim? A. No, sir; I did not.

Q. You don't know who examined him or when he was examined? A. No, sir.

120 Q. But the money that was subsequently paid, so far as you know, was paid at your home or somewhere else? I am talking about this railroad matter now. A. The railroad insurance premiums, you mean?

Q. No, not the premiums, I do not mean the premiums, but I refer to the benefits? A. They were

brought over there by Mr. Melius.

Q. To the house? A. Yes, sir.

Q. When was the first one brought, if you recall; about when? A. In October, I think.

Q. But you do not know when he first made claim for that, do you? A. No, sir; I do not.

Mr. Tompkins: I think that is all.

Redirect examination by Mr. Bockes:

Q. Now, what about the Knights of Columbus insurance; when did he stop making payments on that and begin to— A. (Interrupting) Well, I don't remember just when it was, but I had a book with the amount due on that and when I looked at the book and found out it was due I sent it in, but with the government insurance there wasn't anything like that and I supposed it had been paid and so I didn't send it in.

Q. Well, you do say you did study this policy when it came? A. Yes, sir.

Q. And did you see the statement of quarterly premium of eleven dollars eighty cents? A. Yes, sir.

Q. And also the receipt for the thirteen dollars and ninety cents? A. Yes, sir.

Q. Which would not make it, with the days of grace, expire until November second, would it?

Mr. Tompkins: I object to that.

The Court: Objection sustained.

Mr. Bockes: An exception, please.

JUDSON MELIUS, called as a witness on behalf
124 of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. Bockes:

Q. Where do you reside, Mr. Melius? A. Oneonta, New York.

Q. How long have you lived there? A. All my life.

Q. What is your business? A. Car foreman.

Q. How long have you been engaged in that occupation? A. About eighteen (18) years.

Q. For the Delaware and Hudson Company? A.
125 Employed by the Delaware and Hudson Company; yes, sir.

Q. And what are your duties as foreman in that department? A. I supervise the car inspectors and repairers in the transportation yards.

Q. Are you acquainted with the late James P. Mahar? A. I am.

Q. When did you become acquainted with him? A. Why, personally, about four or five years ago, but I had known him fifteen or sixteen years on the section, working in the section.

Q. Now, we will go back to when you first knew
126 him: What did you know about his health at that time? A. It was very good.

Q. I do not understand you. A. Very good.

Q. And did it continue to be apparently good until he came to work for you? A. Yes, sir.

Q. And from that time on and until when? A. Well, I should say along in September some time.

Q. Just what were the duties that he performed

under your direction? A. Well, he had to do the usual duties of that position; he was a car inspector and repairer and he had to follow the inspector up and make the repairs in the train, carrying a bag which probably would weigh twenty-five or thirty pounds on his shoulders and consisting of nuts and bolts and cotter keys and so forth. 127

Q. And what were they for, for the performance of what duties? A. Repairing cars; so-called light repairs in the yards; fixing brakes and so forth.

Q. And is it considered heavy or light work? A. Considered pretty heavy work.

Q. And did he do that steadily while working for you? A. Yes, sir.

Q. What sort of an appearing man was he, physically, Mr. Melius? A. Well, how do you mean; rugged? 128

Q. Yes, sir; or otherwise? A. Well, if I am not out of order, I would like to show you and refer you to juror number nine; if that is not out of order.

Q. You will not mind that? (The juror: No.) I thought you would not object to that. A. A rugged man; looked just like that.

Q. And did he continue rugged looking down to September, 1927? A. Yes, sir; he did.

Q. And before I forget it: Something was said upon cross-examination of the previous witness about an application for group insurance; now, it was you, yourself, who had charge of that; was it not? A. Yes, sir. 129

Q. Just explain to the jury what there was to that? A. Well, after a man is sick for seven days, it is the duty of the foreman to take an insurance

blank to his house or the hospital, wherever he happens to be, and have it filled out; if he does not, why, he is usually severely criticised by his superior for not doing it.

Q. And did you do that in this particular case? A. Yes, sir.

Q. You took it to the house? A. Yes, sir.

Q. So it was not anything Mr. or Mrs. Mahar instigated? A. No, sir; I am the one that has to do it.

Q. Now, tell the jury what you observed about a change in his physical health, if any, in September and what you did about it? A. Well, prior to September he was a man that while with the gang of men, he was usually joking with them, or fooling, and he done his work and everything with pep, and he was always full of life; well, then, he began to act different, no joking or fooling, kind of indifferent, as if he was not just right. Well, I spoke to him and he told me, well, he did not feel the best. That is all. And so it went along that way for a couple of weeks, and having another job there that requires a man to perform the work, but which is lighter work, I put him on that, and what we call a hump inspector, and that would consist of a man inspecting cars after they go over the hump to see what damage is done to them and making out rules 120 and 44, and if they are damaged, applying a tag to the car and sending the car to the repair track for the work to be done. He didn't have any manual work to do there.

Q. You say there was no manual work for him to do? A. No. I did that on account of the family and

figured he would regain his health and come back on his own job.

Q. Now, what is the fact: Did you have any lighter work under your control? A. No, sir; that was the lightest work I had there. 133

Q. And then he continued along until what time? A. Along in September some time.

Q. Did he go back to this heavy work at all? A. No, sir.

Q. And so from September eighth on, did he do any heavy work? A. No, sir.

Q. And he did nothing except this job you transferred him to during his sickness? A. That is all.

Q. Did the compensation insurance, in the group insurance, go through your hands? A. Yes, sir. 134

Q. And you were the one who delivered it to the house? A. I did it until I was taken sick along in May or June, for about six weeks or so, and then I told my gang leader to take that up.

Q. Did you see James P. Mahar after he left the D. and H. shop October seventeenth or eighteenth? A. I saw him a few times up to his house; usually interested in the men working for me and if they are sick I usually go and see them.

Q. How frequently did you see him there after he left the D. and H.? A. Well, I had to see him at least once a week, because I had to take the check there. 135

Q. Did you see him at any time at work around the house? A. No, sir.

Q. Physical or mental? A. No, sir; they usually sat there quiet and indifferent.

Q. What do you say with respect to whether at any time he seemed to be any better after he first began to be sick? A. No, sir; I would not say so;

I wouldn't say I saw him improve greatly, if at all. I met him one day down in front of the Brown House
136 and he said he was up to get his teeth out, that he had to have them out, and the next time I saw him was up at the hospital.

Q. Did you notice any apparent change of weight? A. Oh, yes.

Q. Just describe what you did notice in that respect and in his physical appearance generally? A. Well, the first thing I began to notice was the kind of yellow color, the yellow complexion, and then he just kind of dropped away; you see, he was quite a rugged man, with ruddy cheeks, and then he changed and just dropped away.

137 Mr. Bockes: That is all.

Cross examination by Mr. Tompkins:

Q. Mr. Melius, do I understand that you superintended the making out of this claim for the group insurance? A. Yes, sir.

Q. And did you have the applications and take them to the house? A. No, sir; they come from the office; I usually have some on hand, though.

Q. I mean, you took them up to the house? A. Yes, sir; I did.

138 Mr. Tompkins: I ask to have this paper marked for identification at this time.

(Paper marked Government's Exhibit Number 1, for identification, of this date.)

By Mr. Tompkins:

Q. I show you Government's Exhibit number one, marked for identification, and I ask you if that is a

copy of the paper which you took up for him to sign? A. It is.

Q. You say it is? A. Yes, sir; it is. Just a 139
moment, please. (Witness examines same.) Yes, sir.

Q. And you saw Mr. Mahar sign this paper? A. Yes, sir; I did.

Q. Government's Exhibit number one for identification? A. Yes, sir.

Q. Do you recall now the first date that you delivered any compensation, as the result of this application, to Mr. Mahar? A. Well, he would have to be off for seven days before he would draw any compensation and it would be a matter probably of five or six days before the first check came and some- 140
times a week, and after that they would come regularly; and so it would be along about the first of November; along in there somewhere, I would say.

Q. That was the first payment which had been made? A. Yes, sir.

Q. Did you get all these papers together and sign and send them yourself, send them in yourself, or just the application made by him? A. Just the one paper we fill out, you see.

Q. This yellow paper? A. Yes, sir; it is filled out and then taken to our office and then mailed to the Albany office and on through the channels, I sup- 141
pose, to the New York office.

Q. Now, did you secure the physician's statement? A. No, sir; he does that; he does that; he calls the physician because he usually has it filled out that way. I don't know.

Q. Was the paper filled out when you got it? A.

No, sir. Let's see. When I received it back, you mean?

142 Q. Yes. A. Yes. Oh, yes.

Q. That is, when you got it back it was filled out? A. Yes, sir; when I got it back it had to be filled out.

Q. In its present form? A. Yes, sir.

Mr. Tompkins: I offer Exhibit 1 in evidence.

Mr. Bockes: No objection.

The Court: Received.

(Application for group insurance, etc., received in evidence and marked Government's Exhibit Number 1, of this date.)

By Mr. Tompkins:

143 Q. Now, briefly, Mr. Mahar's regular duties involved quite a little physical power; did they not? A. Oh, yes.

Q. He had to lift heavy weights or heavy pieces of material? A. Well, no, not too heavy; they were not—oh, well, the knuckles, I would say, would weigh seventy-five or eighty pounds; that was the heaviest; he would have to lift them up and put them in the couplers and put the pin in.

Q. He would have to lift this seventy-five pound weight up and put it in some part of the car? A. Yes, sir.

144 Q. And it required quite a lot of physical strength? A. Pretty good deal; yes, sir.

Q. About how much would you say that Mr. Mahar weighed when he was in his regular state of health before this accident, or sickness? A. Well, I would say, he was a short man, he wasn't very tall, I would say one hundred and eighty-five or one hun-

dred and ninety pounds; along in there; he was a good weight.

Q. Now, did you take his time, or did you see when he came to work every day? A. Every day. 145

Q. And what time was he supposed to report in the morning? A. In the afternoon; he went to work at three o'clock in the afternoon.

Q. He went to work at three o'clock in the afternoon? A. He went to work at three o'clock in the afternoon and he worked until eleven o'clock at night.

Q. And worked until eleven o'clock at night? A. Yes, sir.

Q. And during this time up to October nineteenth, when he quit work, did he report every day during these last few weeks? A. Very steady worker; he was very steady. 146

Q. He came promptly at the appointed time in the afternoon and stayed his full hours? A. The full time; yes, sir.

Q. Was there any deduction in his pay, or any change in his pay during this period, this first period and the latter period of his work there? A. No, sir; this work I put him on had to be performed by somebody and I took the other man off because he was a good rugged man and put this other man on.

Q. And he did that work properly? A. He did that work properly. 147

Q. And he received the same compensation all the way through? A. Yes, sir.

EARL C. WINSOR, called as a witness on behalf
148 of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. Bockes:

Q. Doctor, are you a duly licensed, registered and practicing physician and surgeon in the State of New York? A. I am.

Q. And you have been for how long, Doctor Winsor?

Mr. Tompkins: The Government will admit his qualifications.

By Mr. Bockes:

149 Q. How long have you been acquainted with the late James P. Mahar? A. Well, I saw him nine or ten years.

Q. Were you his family physician during that time? A. Yes, sir.

Q. What did you notice about his appearance of health and in your attendance on the family, up to September, 1927? A. I had treated his family for everything, except himself; he had never been sick, as far as I know, previous to that.

Q. You attended at the childbirths, when the children were born? A. Yes, sir.

150 Q. And you were his regular family physician; as I understand it? A. Yes, sir.

Q. Now, was there anything about his appearance that attracted your attention in September, 1927? A. Yes, sir.

Q. What? A. I had not seen him in quite some time and he had changed so materially; I met him

on the street in Oneonta and he said: "Hello, Doctor", and I stopped to pass the time with him and visit with him as we always did when we met, and he was emaciated and looked pinched and worried, and so much so that I asked him, I said: "Jim, what is the matter with you?" "Well", he says, "I do not feel very good." I asked him if he was working and he said "yes", that he was trying to and he said, voluntarily, I was not drumming up any business, you know, he volunteered the fact that if he did not feel better shortly he was coming up to see me, and I told him that he better do that because he looked bad. 151

Q. Well, did he afterwards see you? A. He did, about the—I think, now, that I saw him on the street in Oneonta along, well, I would say it was around the middle of September, and he did not come to my office until October seventeenth, I think. 152

Q. Now, state what you observed and found out upon your examination of him on October seventeenth? A. Well, physically, he was run down, he had lost a great deal of weight; I could not swear to just how much his ordinary weight was because I never weighed him, I never had occasion to weigh him, and I should say that he was a man that weighed around one hundred and eighty or one hundred and ninety pounds, and at the time he was in the office he only weighed around one hundred and sixty-five pounds; he had lost about twenty-five or twenty pounds, since I had seen him last. Now, at the first office visit he was not jaundiced. His color was very peculiar; there was a yellow tint and 153

a sallow appearance and blend of his skin, which was just a prodromal symptom of jaundice; and I
154 did not consider, I did not think he was serious, because I did not think he could be seriously ill, being a man of such robust physique, but I turned it off rather lightly the first time, and I attributed the fact to a catarrhal jaundice and gave him the usual medical remedies which were of absolutely no avail; he did not respond in any way, shape or form, and on one of the subsequent visits which were once, at least once a week, up to the time he was sent to the hospital, I called Doctor Brinkman in consultation. Nothing I gave him did any good whatsoever and he continued to run down all the time.

155 Q. Just a minute. Doctor, do you remember about what time Doctor Brinkman was called into consultation? A. Why, I think it was along about the middle of November, or perhaps a little after that.

Q. Well, now, Doctor, when you gave him this examination when he came to see you in October, what would you say as to whether or not he was totally and permanently disabled or incapacitated?

Mr. Tompkins: I object to that as incompetent and the witness not shown qualified to answer, and
156 further I object to any further testimony along this line as it now appears this policy had lapsed before any of these happenings with Doctor Winsor too took place, except perhaps the meeting on the street in Oneonta in September, and this is after the middle of October that he is offering proof now.

The Court: I will overrule that objection.

Mr. Tompkins: An exception.

The Court: Doctor, from your examination at that time are you in a position where you can base an opinion upon your examination, without any future happenings, as to the future probability of his disability? 157

The Witness: Yes, sir; I am.

The Court: The objection is overruled.

Mr. Tompkins: An exception.

By Mr. Bockes:

Q. The Court says you may answer. A. What is the exact form of the question?

Q. The stenographer will read it. 158

(The stenographer repeated the question as follows:

"Question: Well, now, Doctor, when you gave him this examination when he came to see you in October, what would you say as to whether or not he was totally and permanently disabled or incapacitated?")

A. Well, there was such a change in his physical condition that during the examination I stripped him in the office and put him on the table, and nothing suspicious as far as internal complications went, as I recall, except he showed some rigidity over the right rectus muscle in the region of the gall bladder, but I felt a robust man who was going down as rapidly as he was and knowing him as I did, I felt that he should cease work—— 159

Mr. Tompkins (Interrupting): I object to any further testimony as to what he felt about it.

The Court: Yes; objection sustained.

The Witness (Continuing): —and knowing him

as I did, I ordered him to cease work on the first visit at the office, which he did.

160 The Court: Let me ask you one question: And that is the time you say that you treated him for a jaundice?

The Witness: The first time he came to the office.

The Court: Well, at that time, there was nothing to indicate, or was there anything to indicate that he was, or would be permanently disabled in the future?

The Witness: No, sir; I could not draw the curtains aside as to the future at that time.

The Court: Well, that is why I asked this question. You are being asked if you could tell, and I 161 say you may answer if you could tell at that time and not from future happenings, but if you can express an opinion from that one examination at that time, I will allow you to answer, but not an opinion as you now look backwards.

The Witness: I see the point and, as I say, I ordered him to stop work.

Mr. Tompkins: I object to that as not responsive.

The Court: That part of it may stand: "I ordered him to stop work."

Mr. Tompkins: An exception.

By Mr. Bockes:

162 Q. Well, was that because he was incapacitated from any kind of work, mental or physical? A. Yes, sir.

Q. You say "yes"? A. Yes, sir.

Q. Now, from your examination and the observation on September fifteenth, or thereabouts, and this subsequent examination, are you able to state when

he first became incapacitated from any kind of labor?

Mr. Tompkins: I object to it on the ground it refers to some subsequent examination and it does not appear when or what and we ought to be able to judge as well as the doctor—— 163

The Court (Interrupting): Overruled. I will take it.

Mr. Tompkins: And an exception.

By Mr. Bockes:

Q. The Court says you may answer. A. The question again, please?

Q. The stenographer will repeat it.

(The stenographer repeated the question as follows: 164

"Question: Now, from your examination and the observation on September fifteenth, or thereabouts, and this subsequent examination, are you able to state when he first became incapacitated from any kind of labor?")

Mr. Tompkins: I submit the answer to that question should be "yes" or "no."

The Court: Yes.

The Witness: Yes, sir.

By Mr. Bockes:

Q. And when was that time, in your opinion? A. Well, as I ordered him to cease work immediately, I felt at that time that it had already gone too far. 165

The Court: And that was October seventeenth?

The Witness: That was October seventeenth.

Mr. Tompkins: I object to that as not responsive and I ask that it be stricken out.

Mr. Bockes: I will consent that go out, and I will

repeat the question to the witness.

166 By Mr. Bockes:

Q. When was it, in your opinion, he became incapacitated from any kind of labor? A. Well, I should surely say by the first of the month, and perhaps before that. He certainly was not in shape to work when he came to my office; I do not see how he could have worked.

Q. And in your opinion he could not work for two weeks before or more? A. Well, at least that, and from the time I saw him on the street in Oneonta, and unless he had a very soft job, I do not see how he could have worked.

167 Q. Now, perhaps I interrupted you. Go on and state just what you did in the way of attending him from this October examination on? As I remember it, you said you attended him once a week or oftener? A. Yes, sir. He came up to the office as long as he was able to ride and then I was down there several times, and there were the various technical things, as blood examinations and other tests, which I did, to try to straighten the tangle out, and, as I said, there was nothing apparently that I could do, and until I told him that I felt that I had treated him long enough, and that he had waited plenty long enough

168 before he came to me, and I advised him to get a consultant, and he asked me to whom I advised him to get, and I told him Doctor Brinkman in Oneonta.

Q. As I understand you, you continued to see him up to the time of his death? A. Yes, sir.

Q. Did he at any time get any better than he was when you saw him in October? A. No, sir; he did not; he got worse.

Mr. Bockes: You may examine.

Cross examination by Mr. Tompkins:

169 Q. Did you sign a report, Doctor, for an application for compensation under this blanket policy carried with the Metropolitan on the railroad employees? A. Yes, sir; I did.

Q. Did you see the statement made by the decedent at that time, which is just above your certificate? Did you see this statement: When were you first unable to work? A. I do not know as he had had that made out when I filled out my part. You see, they bring them in and there is the physician's part and I filled this in, and this, well, I do not know whether this was filled in previous to that, when I 170 filled that out, or not.

Q. You do not know whether it was or not? A. No, sir.

Q. You recognize the signature below that answer to that question; don't you or do you? A. I would say probably it is his signature; I am no expert, however.

Q. Do you think you are more capable to judge whether the man was able to do his work or not than he was himself? A. I thought I was; yes, sir.

Q. Well, if a man did work, would you consider him able to work? A. No, sir. 171

Q. In other words, if he was incapacitated and could not work and then did work, why, he is wrong; he could not have worked; is that the way you want to be understood? A. He did work, but it was not for his best interest.

Q. Oh, well, that was not the question. You said he was incapacitated? A. Yes.

Q. What do you mean by "incapacitated", Doctor? A. By "incapacitated", I mean inability to work.

172

Q. Yes. Now, if the man said the first day he was unable to work during this period was the seventeenth of October, or the nineteenth of October, at three o'clock P. M., then would you say that your opinion was better than the decedent's? A. From my standpoint, it certainly would be.

Q. Well, if a man did work, then he was not incapacitated; was he, Doctor? A. Well, the effect was plain enough, he did work; no question about that.

Q. What do you mean by being incapacitated?

173

A. And the fact he had to have his job changed would be evidence, I think, he certainly could not do physical work.

Q. Well, if he did and he certifies it, then you must be wrong in your opinion he could not? A. He told me down in Oneonta, he said: "I can hardly work; hardly do my work."

Q. Hardly? A. Away back in September, September fifteenth, or some time thereabouts.

Q. Is it your observation that persons afflicted with jaundice always die from the effect of jaundice? A. No, sir.

174

Q. Is jaundice considered an incurable disease? A. A jaundice is a symptom and not a disease.

Q. Well, how do you distinguish or differentiate between a symptom and a disease? A. Well, a disease shows pathology and a symptom is a manifestation of disease pathology.

Q. Then, to your mind, if a man had jaundice, it

would simply mean that he has got yellow skin or something like that? A. Not a yellow skin, but an appearance that is due to a bile pigment in the skin. 175

Q. Did you accompany him to the hospital when he was operated? A. Yes, sir.

Q. Did this operation disclose any condition, physical condition which would have made it impossible for Mr. Mahar to survive? A. Yes, sir.

Q. Prior to the operation, or at the time of the operation and prior to it, what do you say? A. Prior to the operation, the physical findings, as I told you, were very scant, and with the exception of the rigidity over this particular region, but there was no means of identity of the trouble, it being up under the ribs at that point. 176

Q. Did Mr. Mahar die as the result of his condition or as the result of the operation? A. As the result of a combination, perhaps, of both.

Mr. Tompkins: I think that is all.

Redirect examination by Mr. Bockes:

Q. Could he have lived, in your opinion, if he had not been operated upon? A. No, sir.

Q. I notice that Doctor Brinkman, through mistake, signed the death certificate: What was the cause of his death? A. The operation—I think perhaps Doctor Brinkman should tell, he being the surgeon, but there was a mass, a nodular, irregular shaped so-called tumor or mass, perhaps the size of a small grape fruit, which lay in the region of the bile ducts of the gall bladder, which we removed, and taking that size mass from the peritoneal cavity sometimes means considerable shock; his condition 177

was not any too good after the mass was removed and subsequently, I think about three or four hours, he very suddenly died, as some cases do, where even the shock is not so very great, from what we determined to be a pulmonary embolus.

Q. And you have all those conditions in mind when you say that in your opinion he was actually unable to work after the last of September, or before? A. Yes, sir.

Mr. Bockes: That is all.

Recross examination by Mr. Tompkins:

Q. What do you mean by a "pulmonary embolism", Doctor? A. A mass of material which might be clotted blood, or it might be a vegetation from any endothelial surface diverted into the blood stream and circulating until it finds a smaller artery than that which was carrying it, which plugged the vessel, and the death resulting or ensuing from that, and when it reaches a vital area it is of very short duration.

Q. And that plugging and so forth, as you describe it; is that necessarily in the location of the operation itself? A. No, sir.

Q. And do you now say that Mr. Mahar died as the result of disease or as the result of this operation? A. I think I said, and I repeat, that he died as a result of a combination of the two. One was the disease and the other was the accident, in that the thrombus hit some vital tract, and I think it is very easy to anybody to see how that is one of the accidents of surgery.

Q. Did Mr. Mahar die as the result of an acci-

dent of surgery? A. He did not. He died from a combination of a disease and the operation, as I first stated. 181

Q. Who performed the operation? A. Doctor Brinkman, assisted by myself.

Q. You would not criticise Doctor Brinkman's act in performing this operation, unless you had some ground for it, would you, Doctor? A. No, sir.

Mr. Tompkins: That is all.

Redirect examination by Mr. Bockes:

Q. Have you any ground for criticising it? A. No, sir.

Q. And I believe you said that in your opinion the disease conditions were such that the decedent, Mr. Mahar, would have died if the operation had not been performed, from that disease? A. Yes; in a very short time, perhaps just a very few days. 182

GEORGE H. BRINKMAN, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. Bockes:

Q. You are a duly licensed, registered and practicing physician and surgeon, Doctor Brinkman? A. Yes, sir. 183

Q. Where do you reside? A. Oneonta.

Q. How long have you practiced? A. Forty-four years.

Q. Did you sign the death certificate upon the

death of James Patrick Mahar? A. Yes, sir.

184 Q. Well, what was the cause of death? A. Chronic cholecyetitis and cholangitis, as the primary cause, and the secondary cause, pulmonary embolism.

Q. Now, what are your qualifications to testify as an expert upon this disease, Doctor Brinkman? A. I did not know that I was an expert.

Q. Well, as a specialist, then, or as a person competent to express an opinion? A. Well, it was my experience in surgery and my preparatory study thereof.

185 Q. And what has that experience been and that study? A. Well, I have been practicing surgery for some time; I practiced the general practice up to 1910, with a minimum amount of surgery, and since 1910 I have done quite a lot of surgery.

Q. And have you followed up your regular medical and surgical course with a special course afterwards? A. Yes, sir.

Q. Now, go ahead and tell the Court and jury what you know about this case of James Patrick Mahar? A. I never saw James Mahar until November of 1927, at least then, and I think he came to see me twice. I can only find a record of his coming there

186 November twenty-one, 1927. At that time I could not judge of his loss of flesh, because I never had seen him before. He was thin, and he was very profoundly jaundiced and, as he expressed it to me, he was extremely weak. On the examination of his urine I found it loaded with bile. He told me his stools, by that I mean the bowel movements, were white, which indicated an absence of bile, and he had

a tender rigid place in his abdomen directly over the gall bladder.

187 Q. Did this condition appear to be of sudden arrival or occurrence, or was it something that had been bothering him for some time? A. I can only tell you that from the history he gave me and I cannot be definite about it as to just how long these conditions had existed, but they had been gradual in their onset.

Q. Well, then, you were called in in consultation with Doctor Winsor on this case? A. Yes, sir.

Q. And what did you decide upon, if anything, at that time? A. Well, at that time he returned to his home and continued under the care of Doctor Winsor. It did not seem to me at that time to be a medical condition, but medical treatment was continued. 188

Q. And what happened then? A. Well, I may have seen him again; I do not know whether I did or not, but on the twenty-third of December he was brought to the hospital and I examined him there and found the same conditions present in a more marked degree, and the next morning, the morning of December twenty-fourth, we operated him, Doctor Winsor and myself, the anaesthetic being given by Doctor Getman.

Q. And when did he die? A. He died that afternoon. 189

Q. Now, something was said about some accident in the operation; was there any accident? A. There was none.

Q. And was his condition such that that operation, in your opinion, was necessary? A. What is it?

Q. And was his condition such that in your opinion that operation was necessary? A. Yes.

190

Q. And could he have lived for many days or weeks if he had not had that operation?

Mr. Tompkins: I object to it on the ground it calls for a conclusion of the witness, and asking for facts, and he has not been asked for an opinion but——

The Court (Interrupting): Well, in your opinion, Doctor?

The Witness: Why, I do not think it was a matter of days; no; but I do not think it was a matter of a very long time. When you come to specify the days a man has to live, you are assuming quite a lot, of course.

191

The Court: Proceed.

Mr. Tompkins: My objection is overruled?

The Court: Yes; overruled.

Mr. Tompkins: An exception.

By Mr. Bockes:

Q. When you say "a very long time", or "not a very long time", that is pretty indefinite, Doctor; now, what do you mean by "not a very long time"? A. Why, in my opinion, he might have lingered along a month; I do not know how long a time, how long he would live. I have been fooled too many times about things like that to attempt to state positively or definitely.

192

Q. That is your best opinion about it, Doctor? A. My opinion is that a month would have been the limit under his condition, the way he was going.

Q. That is what I meant. A. Yes.

Mr. Bockes: You may examine.

Cross examination by Mr. Tompkins:

193

Q. Doctor, is jaundice a condition or a disease? A. It is a symptom.

Q. What? A. It is a symptom.

Q. Will you explain to the jury, if you are able, Doctor, just how Mr. Mahar came to succumb as the result of this operation, not in medical terms? A. I shall avoid medical terms as far as I can.

Mr. Mahar was a good deal weakened as the result of his disease; his condition was not good, but it was getting no better, it was getting worse. He had some condition, we knew, that obstructed the flow of bile from the liver to the intestines; that was what produced his jaundice. What that condition was, we did not know. But we do know that where a condition of jaundice persists for that length of time, it probably is not an acute condition, but probably some chronic condition; and if I may be permitted, and if I am wrong, stop me, my opinion was when I operated Mr. Mahar, that he had a chronic inflammation of the gall bladder, together with possible gallstones.

194

He had the chronic inflammation of the gall bladder and he had no stones, but he had a growth involving the walls of the gall bladder which blocked the passage of bile from the liver to the intestines, where it should normally flow. Now, if it does not go there, it is absorbed from the liver into the blood and is passed out through the tissues, and hence the jaundice might be the result of gallstones, might be a swollen membrane, a cancer, or any one of a half

195

dozen different things that could produce that jaundice; jaundice is merely a symptom of obstruction, and what the obstruction is has to be determined in some other way.

196

Q. Well, you did not get the point of my question, Doctor, as to how he came to succumb as the result of the operation? A. Well, I guess I did neglect that.

His condition, as I said, was not good. Operations in the upper abdomen are productive of a considerable degree of shock, and when he left the table he was mortally shocked as the result of that. I stayed with him for some time after the operation. He seemed to recover quite considerable from the shock; his pulse improved and his skin became warm; he was generally better.

197

Later on I was called back. He had suddenly developed symptoms of what we call pulmonary embolism, that is, the lodgement of something in the vessels between the heart and the lungs, symptoms of which are very pronounced, a very definite dyspnea, cyanosis, and if you don't know what that is, the "dyspnea" is difficult breathing and "cyanosis" is bluishness, and the end comes very quickly, and it did come very quickly, and I think in twenty minutes from the time of the development of the cyanosis symptoms he was dead. I hardly had time to more than get to the hospital.

198

Q. Now, if I may be allowed to ask you a little further: The result of this blood clot caused what, by that stoppage of the heart and lungs, or this lodgement in the vessel between them, as you ex-

press it? A. Well, if you asked me to tell the exact mechanism by which it produces death, I probably am unable to do that, but if blood cannot flow from the right heart into the lungs, it cannot be oxygenated by breathing and that is what causes the blueness, and, of course, a man cannot live without oxygen in his blood. 199

Q. Have you performed many of these operations? A. Do I?

Q. Have you? A. Yes, sir; a great many; every case is different from another case; there are no two cases alike.

Q. Are such conditions as found in Mr. Mahar often remediable by operation? A. If the growth is removable and is not malignant, they succeed frequently; a good deal of risk to it, we think. In cases of gallstones, or chronic cholangitis alone, the degree of success, the percentage of success is high and the mortality is low. 200

Q. And then you had every reason to expect a successful termination of this operation in this case, did you not, Doctor? Did you have reasonable ground to expect it? A. Reasonable ground, yes. We did not expect that Mr. Mahar would make a complete recovery without a subsequent operation, and after the operation was over and the growth which was removed was examined, I questioned whether anything more could be done; it was not examined at the laboratory, but it had the gross appearance of a section of carcinoma tissue, carcinoma being a cancer. 201

Q. Now, Doctor, you stated that the proximate cause of this death was this blood clot? A. Oh, no,

I did not state that.

202 Q. Did you not? A. I did not. I said he was shocked; he would have died from the blood clot with nothing else, but there is the shock, the shock possibly would have been sufficient without the blood clot; we cannot tell when a person begins to recover from shock that it is going to be permanent. Shock often goes on for hours after an operation is performed.

Q. Well, what is the nature of this contributory cause of death which you have stated in your death certificate, Doctor? A. The contributory cause was pulmonary embolism.

203 Q. Well, as I understood you, maybe I am wrong, that was caused by the effect of the blood clot in the artery, was it not? A. Well, in making out death certificates, of course, it is necessary to state, first, what is the primary cause, the pre-existing condition and, second, the contributing cause, or anything that develops later.

Q. Well, now, just so we won't mislead the jury: Was it or was it not the result of this blood clot in the artery? A. He could not live with the blood clot in the artery.

Q. What? A. He could not have lived with the blood clot in the artery.

204 Q. And he did have the blood clot in the artery, according to your death certificate? A. What is it?

Q. He did have the blood clot in the artery, according to the death certificate here? A. He did not have an autopsy, but that was my judgment.

Q. And the blood clot, was that a result of the operation? A. I don't know. Blood clots develop

in an artery, and embolisms develop where there have been no operations, and they have a number of times in my own experience. 205

Q. Did Mr. Mahar die as the result of accidental surgery? A. No, sir. Now, I want to know what you mean by "accidental surgery", if I may. The surgery was not an accident; it was performed as the result of a plan.

Q. Well, was it an accident as the result of the surgery which you performed? A. I don't know. I do not know whether the embolism was due to the surgery, or whether it would have developed without surgery. I cannot tell you that. It does occur with and without operations. It follows child birth; it follows various conditions; it will follow varicose veins, and a great many other conditions, and so when you say or ask positively, what caused the embolism, I do not know. 206

Q. No, but if you just performed an operation and with its attendant laceration and the blood flowing, and the man has died of embolism caused by a blood clot, would you expect that this was a coincidence that the blood clot arose from some other cause? A. What is this about laceration, you say?

Q. Well, with your cuts and the blood flowing? A. We did not lacerate.

Q. Well, what did you do? A. We cut. 207

Q. All right. You cut, and that caused the blood to flow? A. Well, it caused blood to flow, but not inside the vessel; it causes a flow of blood outside of the vessels, the cut-off vessels.

Q. Do you expect, Doctor, that this blood clot in the artery was caused by the operation or by some

diseased condition? A. Well, I just answered that a few minutes ago and told you I did not know.

208 Q. I am asking for your honest opinion about it, Doctor? A. It may have come from either one; I do not know what it did come from.

Q. Well, if it did come from disease, it would be a remarkable coincidence that it followed just after this cutting and the flow of blood, which might produce it in and of itself? A. The flow of blood had absolutely nothing to do with it. I do not know where you get the flow of blood.

Q. Well, where do we get the blood clot in the artery? A. Well, we do not get it from any blood that flows outside of the vessel.

209 Q. You might have got it inside from cutting him open? A. It was all over then.

Q. Well, the cut might have produced it? A. Produced what?

Q. Produced the blood clot and caused it to flow? A. It was already flowing; the blood that was in the vessel, that did not flow out. I do not believe I understand you. Either you don't know or I do not get what you mean; I do not get the significance of your question.

Q. Well, I will ask this generally: I would like to know whether this embolism, pulmonary embolism, came as the result of the operation or came as

210 the result of disease; I would like to know that? A. I suppose I will have to say what I did before.

Q. Will you give me an honest opinion as to that now? A. I haven't any; I don't know; it could come with or without.

CARL CONROW, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows: 211

Direct examination by Mr. Bockes:

Q. Mr. Conrow, where do you live? A. Oneonta, New York.

Q. What is your business? A. Gang leader.

Q. Were you assistant foreman under Mr. Melius? A. Well, assistant foreman and gang leader, acting gang leader.

Q. And were you acquainted with James P. Mahar of Oneonta? A. Yes, sir.

Q. How long did you know him before his death? 212
A. Oh, I would say in the neighborhood of three years.

Q. And I have a memorandum here that for about two years prior to his death, you worked with him? A. Yes, sir.

Q. What was the work that he did for the D. and H.? A. Well, his detail was car inspector and repairer.

Q. Just tell the jury what that work was again. A. Well, he inspected the cars as they came into the yard, and then make such as the light repairs, like anything being off, nuts and so forth, make them, or 213
put them on; make the light repairs.

Q. Something was said about a tool chest which he had to carry with him? A. Well, that was a bag that the repairers have to carry their nuts and cotter keys and things like that in.

Q. Now, do you know of any change in his work

in the month of September, 1927? A. Why, I remember he was transferred; yes, sir; from the receiving yard to hump inspector.

214 Q. Do you know why? A. Well, on account of his—well, it seems to me it was on account of his physical condition. I remember once that he said——

The Court (Interrupting): Do you know why, or do you not?

The Witness: Well, it was because he was gradually, well, that he was, well, he could not do his regular duties as he had done theretofore.

By Mr. Bockes:

Q. As a matter of fact, did he have help? A. What?

215 Q. As a matter of fact, did he have help? A. Well, yes; the boys, different ones, helped him.

Q. And I wish you would tell the jury just what you observed about his physical condition in connection with the time that he was transferred from his regular work to this light work? A. Well, he gradually, I should say he was getting thinner, and he seemed to lose weight and to lose his pep, and he didn't seem to have the life like he had it before, and through his foreman, Mr. Melius, he was given this hump inspector's work as a lighter work to do.

216 Q. And even in this work, did his friends help him to some extent?

The Court: Well, were you there when he was doing his work as hump inspector?

The Witness: I was gang leader; yes, sir.

The Court: Was he working under you on both jobs?

The Witness: Yes, sir.

By Mr. Bockes:

217 Q. What I am asking you about is help for him when he took this light job? A. Well, I do not remember as to that, but he had help when he went down on the hump as hump inspector.

Q. And you worked with him, I think you said, two years; was it? A. Why, approximately two years; I could not tell exactly; I know I was promoted from car inspector to gang leader in 1926, April fifteenth, 1926, and at that time he was working on the middle shift and he came under my supervision. Of course, I had seen him before that; as I would be getting through at three o'clock he would be coming to work.

218 Q. And when, or what time in September was it that you remembered such a change in his physical appearance? A. Well, it was some time in September; I could not tell exactly the date; I haven't any record of the date.

Q. It was also in that month that he was transferred? A. Mr. Melius has records of the dates and he keeps the time book. It was in that month that he was transferred.

Q. Just describe what the duties were on what you call the hump job. A. Well, it is after the cars have had receiving yard inspection and they come in with an engine and what we call putting them over the hump, that is a grade up and down, where they go up and down over the hump, and sometimes they have what we call hump damage, like loads being shifted and so forth, and that was his work, to see these cars, after they had been over the hump and,

219

in case there was something wrong, he would take
220 care of it and put the repair cards on the cards and put a report in on the same to the yardmaster.

Mr. Bockes: That is all.

Mr. Tompkins: I do not think I have any cross examination.

Mr. Bockes: That is all of this witness, then. I will next call Mr. Hitchcock.

ERASTUS HITCHCOCK, called as a witness on behalf of the plaintiff and being duly sworn, testified
221 as follows:

Direct examination by Mr. Bockes:

Q. Where do you reside, Mr. Hitchcock? A. Oneonta, New York.

Q. Were you acquainted with the late James P. Mahar? A. I was.

Q. Did he live near you? A. Two blocks away.

Q. And did you go back and forth together to work; were your hours the same? A. We did and they were.

Q. And how long did that continue? A. Well, we were going back and forth, oh, for about a year or a
222 year and a half.

Q. During the years 1926 and 1927? A. Yes, sir.

Q. And were you present when James P. Mahar made his application for reinstating his federal life insurance? A. I was with him the day he mailed the application.

Q. And did you talk with him various times about doing it before that? A. Yes, sir.

223

Q. Do you know about his dropping some smaller policy and taking this, and planning to take this as a substitute? A. Well, yes; he was talking about dropping one, but I could not say whether he did drop it or not.

Q. I wish you would give a description to the jury of him as he was previous to September. A. Well, he was a fellow weighed about one hundred and eighty to one hundred and ninety pounds; he was about five foot, three or four tall, and he was robust and ruddy faced and rugged.

Q. Was he a steady worker? A. Steady worker; yes, sir.

224

Q. And what kind of work did he do? A. Car inspector and repairer.

Q. And, now, soon after the first of September, there was a change; was there not? A. Yes, sir.

Q. And just describe that to the jury.

Mr. Tompkins: I object to it as assuming a fact not proven.

By Mr. Bockes:

Q. Well, was there a change in his appearance soon after the first of September? A. In his appearance?

Q. Yes. A. There was.

225

Q. And just describe that to the jury. A. Well, his eyes kind of looked like kind of yellow, and his skin turned kind of yellow, and he lost weight, considerable, and then he complained most every night, he didn't think he would be back to work the next day, but he said he really had to on account of the

payments he had to make on his house.

Mr. Tompkins: I object to this.

226 The Court: Objection sustained.

By Mr. Bockes:

Q. We could not hear you very well. What did you say about complaints? A. He wasn't feeling very good and he didn't think he would come to work the next day and couldn't take care of his work.

Q. And when was it he said that? A. About the middle of September.

Q. And did you know about a transfer of James P. Mahar from the job he held with you to some other job? A. Yes, sir.

227 Q. And when was that? A. Well, I could not say exactly what date that was.

Q. Well, was it in the early part of September? A. Well, around the early part of September, I think.

Q. Do you know what the nature of his work there was? A. You mean after that time?

Q. Yes. A. To inspect cars after they go over the hump and to specify the various points and specific damages, if any.

Q. And did that last job involve making any repairs himself or handling any tools? A. No, sir.

Q. And what about his condition, his conversation and general manner and conduct, after September?

228 Mr. Tompkins: I object to this as leading and assuming a fact not proven.

The Court: Well, overruled.

Mr. Tompkins: An exception.

The Witness: Well, he didn't seem to take any interest in his work.

Mr. Tompkins: I object to that and move to strike it out.

The Court: That may go out. 229

Mr. Tompkins: He cannot characterize it.

The Court: It may go out.

By Mr. Bockes:

Q. And did you know of his working around home before and after September first, or September eighth? A. No, sir; I used to see him working in the garden quite often during the summer.

Q. Did you ever see him after September eighth work in the garden? A. No, sir.

Q. Or do any work around home after September eighth? A. No, sir; about every time I went over there he was always sitting on the porch, generally, or in the house. 230

Q. And before the first of September, how was he with respect to his being busy around the house? A. Well, he was always, when I found him at home, he was always doing something.

Mr. Bockes: You may examine him.

Cross examination by Mr. Tompkins:

Q. Are you the gentleman that took Mr. Mahar to work; are you the one that called to take him down to work; did he ride with you? A. Yes, sir; he rode with me part of the time and part of the time I rode with him. 231

Q. You both had a car? A. Yes, sir; we did.

Q. And you went to work together? A. Yes, sir.

Q. And during all this time from in September, 1927, down to October nineteenth, 1927, did he go to

work every day; that is, every working day? A. Yes.

232 Q. And you were on time; you had to report at three o'clock and you were on time? A. Yes, sir.

Q. And he stayed for the period of his work? A. Yes, sir.

Q. And this change of occupation you speak of; his regular duty was assigned to some other employee and he did that other man's work, did he not? A. Yes, sir.

Q. And somebody had to do that work? A. Yes, sir.

Q. And he did that work satisfactorily, did he not? A. As far as I know.

233 Mr. Tompkins: That is all.

Mr. Bockes: That is all.

The plaintiff rests.

Mr. Tompkins: The defendant moves for a nonsuit, if the Court please, on the ground that the plaintiff did not prove the cause of action, specifically, upon the ground that the plaintiff has not proved the policy was in force and effect, and it had lapsed prior to the death of the decedent, and, secondly, from out of the mouths of the plaintiff's own witnesses it has been proved that the decedent was

234 not totally and wholly disabled during the period within which he had time to pay the premium, but on the contrary he was regularly and gainfully employed.

The Court: I will hear you gentlemen on the motion.

Because of the hour, gentlemen of the jury, we will take an adjournment at this time.

You will not discuss this case amongst yourselves or allow anyone to speak about it in your hearing; you will also refrain from reading any mention of the case in the newspapers, if any there be. 235

You may now be excused until tomorrow morning at ten o'clock, this place.

Now, may I see the policy in this case, gentlemen?

Mr. Bockes: Yes, your Honor.

(Same handed to and examined by the Court.)

(Discussion outside the record which the stenographer was directed not to take.)

Adjournment taken until Tuesday morning, May tenth, 1932, at ten o'clock, same place. 236

Morning session, Syracuse, New York, Tuesday, May tenth, 1932, 10:00 A. M.

Presiding: Honorable Frederick H. Bryant, United States District Judge.

Appearances:

(Same as before.)

(Roll of jurors called and all found to be present.)

The Court: The motion for nonsuit is denied, with permission to renew.

Mr. Tompkins: I take exception to the denial and note permission. 237

If the Court please: The defendant offers in evidence the original application for the reinstatement and the issuance of this policy in suit, signed by Mr. Mahar in the presence of Donald H. Grant, and also

the medical examiner's report, which is a report of
238 and attached to this application, and which was testified to by Doctor Augustine. This was submitted to them before we let the doctor go yesterday to identify him.

Mr. Bockes: We do not dispute the signature of James P. Mahar and we do not object to the introduction of this paper as a whole, but we do object to that part of the application which purports to allocate the thirteen dollars and ninety cents ($13.90) for certain specific purposes. We object to that part of it, on the ground that it does not appear to have been accepted by the government with that distribution of thirteen dollars ninety cents ($13.90).

239 Second: It does not appear that the applicant himself made those figures or knew of them or that six dollars and seventy cents ($6.70) was or could be locally applied upon his previous ten thousand dollar ($10,000) policy, which the applicant was seeking to reinstate.

Third: That that part of the application is inconsistent with the insurance policy itself afterward made and delivered has a final and complete statement of the contract between the plaintiff and the government.

240 Fourth: We object to the introduction of this unless it is accompanied by some stipulation as—a general stipulation of the government about the matter of three dollars thirty-five cents ($3.35) of this amount actually applied to the old War Risk Policy elapsed in 1919.

The Court: Does not that last mentioned show by one of the exhibits you introduced?

Mr. Bockes: We did not introduce it. We offered it. 241

The Court: The paper offered in January shows it was introduced. It shows the amount that was applied on the premium, which was within the three dollars and thirty-five cents, or whatever the figure that was submitted, does it not?

Mr. Bockes: I wonder if the counsel for the government will concede that.

Mr. Follett: That evidence was ruled out, was it not?

The Court: No. It went in with an exhibit without objection.

Mr. Tompkins: This is the paper your Honor refers to? 242

The Court: Yes.

Mr. Follett: We asked counsel for the government to furnish today the allocation of all payments and we would like to renew our motion that they produce.

Mr. Tompkins: If the Court please: We have a copy of the letter. I do not know the officer, it does not appear at the top of the letter, in which he states he is enclosing to the plaintiff a photostatic copy of the Bureau of Records.

I think that the government will be quite willing to introduce that entire letter, or copy, into evidence, if that is what you want us to do. 243

The Court: The objection to the application is overruled. The plaintiff may have an exception. The application is received.

If it is necessary to introduce other papers to clean

up any arguments about it, I will entreat the application and receive the other papers.

244

May I see that letter that you offered yesterday?

(Letter presented to Court.)

(Application for reinstatement received in evidence and marked Government's Exhibit Number 2.)

Mr. Tompkins: I have one witness here, your Honor.

RAYMOND MATHIAS, called as a witness on behalf of the government and being duly sworn, testified as follows:

245

Direct examination by Mr. Tompkins:

Q. Mr. Mathias, where do you reside? A. Albany, New York.

Q. What is your position? A. Chief Clerk of the Personnel Department of the Delaware & Hudson Railroad.

Q. And have you with you the record of the employment of James P. Mahar of Oneonta in connection with your railroad? A. Yes, sir.

246

Q. And will you examine that report and tell us what you find as to his employment in the year of 1927? A. Our records show that Mr. Mahar was a car repairman, employed by the company at Oneonta, and that he was taken ill on October eighteenth, 1927, and died on December twenty-fourth, 1927. With the exception of that period,

the record does not indicate that he was absent on account of illness any other time.

247

Q. Does your record show anything about his pay? That record does not contain anything about his pay, whether he received full time or not? A. No. I don't have that particular record.

Q. And whether or not that your record shows that this is the only claim that Mr. Mahar ever made for illness while in your employ in recent years? A. That is the only claim he ever made.

Q. And your railroad carried a blanket insurance provision covering your employees from sickness and accident and death? A. Yes.

248

Q. And Mr. Mahar was covered with others, by that insurance? A. Yes.

Q. Do you have with you the records of anything about this insurance, does it show in your record anything beyond these claims before the fact that he made the claim? A. Our records show that he last worked October eighteenth, 1927, and was taken sick on the nineteenth of October, 1927, and that the statement of his doctor on this particular claim showing arterial jaundice.

Q. I suppose it also contains the record that he died and this insurance was paid? A. Yes, sir; it shows that he received the sum of one hundred and twenty-eight dollars, fifty-seven cents ($128.57) under this health claim covering benefits from the date of his illness to the date of his death.

249

Mr. Tompkins: That is all.

Cross examination by Mr. Bockes:

250 Q. Is there anything in your record to show that there was any black marks against him; in other words, anything against him during all the time he worked for the D. & H.? A. He was satisfactory, according to the record.

Q. Do you know from the record of the D. & H. Company if the man had a satisfactory record when taken sick?

Mr. Tompkins: I object to that.

The Court: Sustained.

Mr. Bockes: That is all.

251 Mr. Tompkins: I think that is all the witnesses we have. I don't know what you wish to do in regard to these papers. As far as I know, these are all the papers we can produce—whether they wish to put these in evidence or not.

The Court: I am going at this time to reverse the ruling made yesterday and allow in evidence, upon the plaintiff's motion, a letter which was offered, which bears date of March first, 1928, and was addressed to Mr. Frank C. Huntington, signed by an officer of the Veterans' Bureau. I am going to receive it for the sole purpose of showing the Government's admission as to the amounts of money received and the way they were applied, not for any other purpose. The defendant may have an exception.

252 Mr. Tompkins: Exception.

Mr. Follett: May we have an exception to that?

The Court: Yes.

Mr. Follett: That the letter does not purport to

cover any policy of the United States Government that has authority to bind itself.

253

The Court: That may be marked plaintiff's Exhibit No. 7.

(Letter dated March first, 1928, from United States Veterans' Bureau addressed to Mr. Frank C. Huntington, received in evidence and marked plaintiff's Exhibit No. 7.)

Mr. Follett: I offer in evidence certain photographic copies of records of the Government which are certified under the statute so as to make it admissable as originals. Do you want me to recite just what they are?

The Court: Probably, you had better.

254

Mr. Follett: One premium account card for the early renewal term insurance applied by the Veteran on November second, 1917.

Two: Premium account card for five-year convertible term insurance policy issued in July, 1927.

Receiving teller's register of the insurance premium receipt issued and identified as 9-2-1213, upon which is recorded the remittance of thirteen dollars, ninety cents ($13.90), which we are talking about.

Remittance listing sheet, identified as 7-2119, upon which the remittance of two dollars, ninety-five cents ($2.95) is shown.

255

Remittance listing sheet, identified by 6-2-5022, wherein is the record of three dollars and ninety-five cents ($3.95), received from the deceased.

Premium notice form returned by the decedent, receipted with the remittance of three dollars, ninety-five cents ($3.95), identified by 7-291.

256 Mr. Bockes: I object to the introduction of all those exhibits, insofar as they bear the comments made by the Government, or its employees, upon them, with respect to such word as "marked in suspense" or otherwise, upon the grounds those comments are self-serving declarations never called to the attention of James P. Mahar and not binding upon his estate.

The Court: Overruled. I will receive the record. You may have an exception.

Mr. Bockes: Exception.

257 Mr. Tompkins: I want to call your Honor's attention to the fact that the first exhibit introduced yesterday on the cross-examination of Doctor Winsor, marked defendant's Exhibit 1, which is an application and examination in reference to the Railroad Company's insurance. I don't know whether your Honor looked at it or not, but I do want to call your attention. It may have a bearing on the certificate of Doctor Winsor accompanying this, stating when the disability began and as to what it was, "I expect the insured will be able to return to work about November ninth, 1927."

258 Mr. Follett: If the Court please, in addition to the exhibits which have just been introduced, the Government would like to hand up to the Court a letter under date of October fifteenth, 1930, written by the United States Veterans' Bureau, the same officer whose letter you recently admitted in evidence over our objection, for the purpose solely to explain to the Court what the Government's contention is. We do not offer the letter in evidence as proof of any facts,

but we are offering for the purpose of making the record complete. 259

Mr. Bockes: I do not want to make a definite objection to that, because the same point is involved, but with the understanding that the same objections are made to the exhibit.

The Court: You have no objection because it is not offered as a fact?

Mr. Bockes: Yes.

The Court: Overruled. I will take the letter.

Mr. Bockes: Exception.

(Two premium account cards; receiving teller's register of the insurance premium receipt; two remittance listing sheets; premium notice form, received in evidence and marked Government's Exhibit Number 3.) 260

Mr. Tompkins: The defendant rests.

Mr. Bockes: Plaintiff rests and moves for a direction of a verdict for the full amount.

Mr. Follett: The defendant moves for nonsuit.

The Court: The motion is at this time denied and you have an exception.

Mr. Follett: And the defendant now moves for a direction of a verdict. 261

The Court: The plaintiff and the defendant both have moved for a direction of a verdict. The Court will take upon itself the decision of the question, without further consideration of the case by the jury. I will reserve for the time decision on the two motions for a direction of a verdict.

The jurors may be excused from further consideration of the case.

262

OPINION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, deceased,

Plaintiff,

against

263

UNITED STATES OF AMERICA,

Defendant.

Action on insurance policy.
Judgment for plaintiff.

APPEARANCES:

Frank C. Huntington, Esq., attorney for the plaintiff.

Hon. O. D. Burden, United States Attorney (B. Fitch Tompkins, Esq., Asst. U. S. Attorney); Joseph H. San, Esq., Insurance Attorney, and William A. Gillcrist, Esq., Asst. Insurance Attorney, of counsel.

264

Bryant, D. J.

This is an action to recover under a policy of insurance issued by the United States upon the life of James Patrick Mahar, now deceased.

Mahar was a World War veteran. He held a War Risk Term Insurance Policy for $10,000.00, which lapsed on August 31st, 1919, through failure to pay the premium due August 1st. In June, 1927, he applied for reinstatement of $5,000.00 of this insurance to be effective July 1, 1927. According to the requirements governing reinstatement, it was necessary for him to pay the premium on the $5,000.00 he desired reinstated for the lapsed month, viz. August, 1919, which was $3.95 and at least one month's premium on the converted policy, another $3.95. About July 1, 1927, Mahar made a remittance of $13.90. How this amount was determined upon, we do not know. It paid for the lapsed month and the months of July and August, 1927, and left $2.65 to apply on the $3.95 to become due September 1st. Under date of July 29th, the United States issued a receipt for this remittance, which contained the following clause:

265

266

> "IMPORTANT.—Insurance under the application evidenced by the above remittance shall be effective subject to the World War Veterans' Act, 1924, and Regulations, i. e., provided that previous term insurance be in force, or if lapsed, reinstatement thereof be approved by the Bureau; or if there be no previous term insurance that the applicant be entitled to Government Life Insurance; and that proper amount be tendered to cover the premium and that application be acceptable to the Bureau; otherwise the above remittance will be returned to the depositor."

267

Manifestly, Mahar did not know at that time whether the requested insurance was effective or

ever would be. He heard nothing further until the
268 latter part of September, when he received the policy in suit, the usual Five Year Convertible Term Policy for $5,000.00. He was not advised how his remittance of $13.90 had been applied or would be applied and whether sufficient or insufficient. The policy shows that it was issued September 19, 1927. According to defendant's contention default had been made prior to that time.

There is not any dispute but that Mahar was in good health at the time he applied for reinstatement. In September he became sick, not to the extent of total disability, but to a degree which necessitated
269 his transfer to an easier position and which caused him to lose interest in business and life. October 17th he became totally incapacitated and on December 24th, 1927, he died, his death following an operation by a few hours.

On November 2nd and December 20th, remittances of $3.95 each were sent. These were retained by the United States and no acknowledgment or receipt was received until after the death of insured. After his death an undated receipt for the $3.95 containing the words "tendered in payment of the premium due
270 September 1, 1927," was received. Manifestly, this was a receipt for the $3.95 sent November 2, 1927, unless it is a receipt for a payment sent by insured which the records do not show. Certainly this receipt has no reference to the December 20th payment, for according to defendant's contention that was tendered in payment of the October premium.

The receipt contains the following:

Premium thru Jan., 1928	$19.75
Received	10.55
Prem. bal. due	$ 9.20

271

Not taking into consideration the December 20th payment, which the receipt ignores, it is impossible to reconcile the figures with the statement of the purpose of the payment.

Claim for the insurance was made by plaintiff as administrator. It was refused upon the ground that the insurance lapsed for non-payment of premium due September 1, 1927, the grace period for the September period having expired midnight, October 2, 1927. No offer to return the $2.65 overpayment and the $7.90 paid in November and December, 1927, has been made.

272

If the defendant was a private insurance company, I would have no hesitancy in declaring it estopped from claiming the policy had lapsed for non-payment of premium. Under the facts in this case, it would be unconscionable to allow a private company to avoid its obligation on the ground of delayed premiums. The same principle should be applied against the defendant in this case. "When the United States went into the insurance business, issued policies in familiar form, and provided that, in the case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business." Standard Oil Co. v. United States, 267 U. S. 76. This policy is not one provided by a government for protection of its soldiers in time of danger. It is a policy issued pur-

273

suant to statute, whereby the Government in consideration of military service rendered and payment of
274 premiums assumed obligations as an insurer. State Bank & Trust Co. v. U. S., 16 Fed (2d) 439.

Having elected to become an insurer and to cast aside its immunity from suit, the Government must have its liabilities or rights as an insurer determined by the same rules as any other insurer and by the same course of reasoning as is applied by the Court in reaching a decision in a like case between private parties.

Plaintiff is entitled to judgment.

Dated January 10, 1933.

275

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

against

276 THE UNITED STATES OF AMERICA,

Defendant.

LAW No. 1389

The above cause was regularly on the calendar and brought on for trial at the May Term, 1932, of Court at Syracuse, N. Y., before me and a jury and after

hearing the testimony offered on behalf of the parties herein and the arguments of the respective counsel, and the plaintiff and the defendant each having 277 moved for a directed verdict in its favor and the issues having thereby been withdrawn from consideration by the jury, and after due deliberation had thereon, I hereby make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. That on or about January 18th, 1928, the plaintiff, The Wilber National Bank of Oneonta, N. Y., was duly appointed administrator of the estate of James Patrick Mahar by the Surrogate of Otsego County, New York, and at the time of trial hereof 278 was duly acting as such.

2. That heretofore and prior to the commencement of this action James Patrick Mahar resided in the City of Oneonta, Otsego County, New York.

3. That on or about June 25th, 1917, at Albany, New York, James Patrick Mahar enlisted for military service in the United States Army and was honorably discharged therefrom on or about April 3rd, 1919.

4. That during his said period of military service the defendant issued to James Patrick Mahar a contract of War Risk Insurance for $10,000, which 279 lapsed on August 31, 1919, for non-payment of premiums due thereon August 1, 1919.

5. That in June, 1927, and prior to July 1, 1927, James Patrick Mahar made an application for a United States Government Life Insurance Policy in the amount of $5,000, and at such times mailed with

his said application his check $13.90 to the order
280 of the Treasurer of the United States and that the said Treasurer of the United States cashed the said check on August 8, 1927.

6. That on or about September 19, 1927, the United States Government issued to James Patrick Mahar a Five Year Convertible Term Life Insurance Policy in the amount of $5,000, and the said policy contained a provision whereby the payment of premiums was waived in the event the insured became permanently and totally disabled.

7. That there is no evidence but that at the time of making such application James Patrick Mahar was in good health.

281 8. That in September, 1927, the said Mahar became sick, not to the extent of total disability but to a degree which necessitated his transfer to an easier position and which caused him to lose interest in business and in all his affairs.

9. That by the 17th of October, 1927, James Patrick Mahar had become permanently and totally disabled and so continued up to the time of his death.

10. That on or about December 24, 1927, James Patrick Mahar died in the City of Oneonta, County of Otsego, State of New York.

282 11. That on November 2, 1927, and on December 20, 1927, Helen Mahar, on behalf of her husband, James Patrick Mahar, mailed to the Treasurer of the United States, money orders each in the amount of $3.95 for payment of the monthly premium provided for in the said policy.

12. That on or about July 29, 1927, the United States Government acknowledged receipt of the

check for $13.90, but did not at that time nor at any time until subsequent to Mahar's death give any notice to Mahar or his family as to the way in which this payment was applied nor did the United States give to Mahar or his family any notice of the way in which it had applied the two payments of $3.95 made in November and December, 1927, until subsequent to his death. 283

13. That subsequent to the death of James Patrick Mahar, his widow received from the United States Government an undated receipt for the sum of $3.95 containing the words "tendered in payment of the premium due September 1, 1927."

14. That said receipt contains the following language written in with a pen: 284

"Premium thru Jan., 1928 ..... $19.75
Received 10.55

Prem. balance due ..... $ 9.20"

15. That the written memorandum set forth in finding "14" includes the payment made November 2nd and December 20, 1927, and is the first itemized statement showing premiums due and unpaid on this policy; this statement was not received until some time in January, 1928, the insured having died December 24, 1927.

16. That the intention of James Patrick Mahar to secure insurance is clear. 285

17. That the Government did not until after the death of the said James Patrick Mahar send any notice to Mahar or his family that any premium or premiums were due or that the said policy had lapsed or was likely to lapse or that the payment of $13.90

had not been entirely applied to the payment of premiums on the said $5,000 life insurance policy, other than contained in the policy, itself, received on or about September 20, 1927.

18. That the Government in addition to retaining the original $13.90 has retained the said two payments of $3.95 and made no offer during Mahar's lifetime to return the said payments.

19. That the said receipt issued by the United States Government for the said payment of $13.90, dated on or about July 29, 1927, expressly stated that the Government did not at that time obligate itself to issue the policy applied for or any policy.

20. That at and prior to the commencement of this action a disagreement existed between the plaintiff and defendant as required by law.

CONCLUSIONS OF LAW

1. That this court has jurisdiction of the parties to and of this cause of action.

2. That the United States went into the insurance business, issued policies in familiar form and it must be assumed thereby to have accepted the ordinary incidents of suits in such business.

3. That the United States Government engaged in the life insurance business in competition with private insurance corporations and thereby became obligated to the same rules as to sending notices and applying premiums and obeying customs, applicable to private insurance corporations, and has failed to give notice and keep the insured informed as required by fairness, equity and law.

4. That by its failure to explain its allocation of moneys paid, failure to give notice respecting future

premiums, failure to return premiums and funds for many months after it now claims the policy had lapsed, and general failure to provide necessary information and explanation to the insured, the defendant has estopped itself from withholding payment because of alleged lapse. 289

5. That the plaintiff is entitled to judgment for $5,000.

Dated May 16, 1933.

FREDERICK H. BRYANT,
Judge of the United States District Court
for the Northern District of New York. 290

912

292 PROPOSED FINDINGS OF DEFENDANT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

against

THE UNITED STATES OF AMERICA,

Defendant.

293 LAW No. 1389

The defendant asks the Court to find in the above case the following facts:

1. That on or about January 18th, 1928, the plaintiff, Wilber National Bank of Oneonta, N. Y., was duly appointed administrator of the estate of James Patrick Mahar by the Surrogate of Otsego County, New York, and at the time of trial hereof was duly acting as such.

Found.

294 2. That heretofore and prior to the commencement of this action James Patrick Mahar resided in the city of Oneonta, Otsego County, New York.

Found.

3. That on or about June 25th, 1917, at Albany, New York, James Patrick Mahar enlisted for military service in the United States Army and was

honorably discharged therefrom on or about April 3d, 1919.

Found.

295

4. That during his said period of military service the defendant issued to James Patrick Mahar a policy of War Risk Insurance for $10,000 which lapsed for non-payment of premiums due thereon July 1, 1919.

Found.

5. That in July, 1927, James Patrick Mahar caused to be reinstated and the defendant did reinstate the said War Risk Insurance policy to the extent and in the amount of $5,000.00 by paying under the regulations duly made one monthly premium of $3.35 for $5,000.00, one-half of the original lapsed contract amount, and the said James Patrick Mahar thereupon converted the said reinstated policy of insurance into a United States Government Life Insurance policy on the Five Year Convertible Term Plan which was issued effective July 1, 1927, in the amount of $5,000.00 and payable to the estate of said insured.

296

Found in part. Certain parts refused in wording requested.

297

6. That at the time of the reinstatement and conversion of said $5,000.00 insurance, said James Patrick Mahar paid the premiums due on said converted insurance policy for the months of July and August, 1927, and which policy provided for monthly premiums of $3.95 to be paid by insured the 1st day of

each calendar month, and, at option, quarterly, semi-
298 annually, and annual premiums.

Partly found. Partly refused because wording does not show true facts.

7. That other than the premiums due on said reinstated and converted policy of insurance for the months of July and August, 1927, the said James Patrick Mahar paid no other or further premiums thereon prior to Nov. 2, 1927, although the said policy of insurance provided for the payment of monthly premiums thereon, except that he had made an overpayment in June, 1927, in the amount of $2.65, which
299 was retained by the defendant.

Found.

8. That the said policy of insurance lapsed and came to an end for non-payment of premiums on August 31, 1927.

Refused.

9. That the said James Patrick Mahar died on or about December 24th, 1927, in the city of Oneonta, Otsego County, New York.

Found.

10. That the said James Patrick Mahar was not
300 permanently and totally disabled during the months of July, August and September, 1927, nor prior to October 17, 1927.

Found.

11. That at and prior to the commencement of this action a disagreement existed between the plaintiff and defendant as required by law.

Found.

12. That at the time of the commencement of this action said reinstated and converted policy of insurance was not in force and effect and no payments thereunder were due the plaintiff, and the following

301

Refused.

CONCLUSIONS OF LAW

1. That this court has jurisdiction of the parties to and of this cause of action.

Found.

2. That at the time of the commencement of this action the contract of insurance therein sued upon and set forth in the complaint herein had lapsed for non-payment of the premiums due thereon from the plaintiff's intestate, the said James Patrick Mahar, and had terminated and come to an end.

302

Refused.

3. That plaintiff's intestate, the said James Patrick Mahar, was not and did not become permanently and totally disabled at any time while the said converted policy of insurance was in force and effect.

Refused.

4. That plaintiff's complaint should be dismissed with costs.

303

Refused.

Dated, May 2, 1933.

OLIVER D. BURDEN,
United States District Attorney.

DEFENDANT'S EXCEPTIONS

304

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

against

THE UNITED STATES OF AMERICA,

Defendant.

305

LAW No. 1389

The defendant files the following exceptions to the findings of fact and conclusions of law, and judgment, made by the Court herein filed May 22nd, 1933, viz:

First. Defendant excepts to that part of the Sixth finding of fact wherein it is found that on or about September 19, 1927, the U. S. Government issued to James Patrick Mahar a Five Year Convertible Term Life Insurance policy in the amount of $5,000, whereas the evidence shows such policy was issued as of

306

July 1, 1927, as required by the statute, but was countersigned and forwarded to the plaintiff's intestate on or about said date of September 19, 1927.

Second. Defendant excepts to the Second, Third, Fourth and Fifth conclusions of law, as not founded upon the evidence and facts found, and contrary to the law.

Third. Defendant also excepts to the failure and refusal of the Court to make the following findings proposed by the defendant and afterwards filed with the Clerk of this court, May 27th, 1933, viz: 807

That in July, 1927, James Patrick Mahar caused to be reinstated and the defendant did reinstate the said War Risk Insurance policy to the extent and in the amount of $5,000.00 by paying under the regulations duly made one monthly premium of $3.35 for $5,000.00, one-half of the original lapsed contract amount, and the said James Patrick Mahar thereupon converted the said reinstated policy of insurance into a United States Government Life Insurance policy on the Five Year Convertible Term Plan which 808 was issued effective July 1, 1927, in the amount of $5,000.00 and payable to the estate of said insurance.

That at the time of the reinstatement and conversion of said $5,000.00 insurance, said James Patrick Mahar paid the premiums due on said converted insurance policy for the months of July and August, 1927, and which policy provided for monthly premiums of $3.95 to be paid by insured the 1st day of each calendar month, and, at option, quarterly, semi-annual, and annual premiums.

That the said policy of insurance lapsed and came to an end for non-payment of premiums on August 31, 1927. 809

That at the time of the commencement of this action said reinstated and converted policy of insurance was not in force and effect and no payments thereunder were due the plaintiff, all of which were fully sustained by the evidence.

Fourth. And excepts to the refusal of the Court

to make and find the following conclusions of law as
310 proposed by the defendant, and filed with the Clerk of this court, viz:

That at the time of the commencement of this action the contract of insurance therein sued upon and set forth in the complaint herein had lapsed for nonpayment of the premiums due thereon from the plaintiff's intestate, the said James Patrick Mahar, and had terminated and come to an end.

That plaintiff's intestate, the said James Patrick Mahar, was not and did not become permanently and totally disabled at any time while the said converted policy of insurance was in force and effect.

That plaintiff's complaint should be dismissed with
311 costs, all of which were sustained by the law and proof herein.

Fifth. Defendant excepts to the making and entry of judgment herein in favor of the plaintiff filed May 22, 1933.

Dated, June 2, 1933.

OLIVER D. BURDEN,
U. S. Attorney in and for the
N. D. of N. Y.,
Attorney for Defendant,
Office and Post Office Address,
312 Federal Bldg., Syracuse, N. Y.

PLAINTIFF'S EXCEPTIONS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

313

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

against

THE UNITED STATES OF AMERICA,

Defendant.

314

LAW No. 1389

The plaintiff files the following exceptions to the Findings of Fact proposed by the defendant and filed with the Clerk of this court May 27, 1933, viz:

I. Defendant excepts to the Findings of Fact numbered "7" and "10".

Dated June 19, 1933.

FRANK C. HUNTINGTON,
Attorney for Plaintiff,
Office and P. O. Address,
241 Main Street,
Oneonta, New York.

315

JUDGMENT

316 UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

against

THE UNITED STATES OF AMERICA,

Defendant.

317 LAW NO. 1389

The above case coming on for hearing on the merits at the regular May term of this court, duly held by Hon. Frederick H. Bryant, the District Judge, and a jury, at the court rooms in the postoffice at Syracuse, New York, May 9, 1932, and the proofs having been submitted at the close of which both plaintiff and defendant moved for a directed verdict; and the jury having been thereupon discharged and the case having been thereupon duly submitted for determination by the Court;

318 And the Hon. Oliver D. Burden appearing for and on behalf of the United States; Mr. B. Fitch Tompkins, Esq., Assistant United States Attorney, and Joseph H. San, Esq., Insurance Attorney;

And the plaintiff having appeared by Frank C. Huntington, of Oneonta, N. Y., its attorney, with George L. Bockes and Sterling P. Harrington of Oneonta, N. Y., of counsel;

And the witnesses on the part of the plaintiff and the defendant having been duly sworn and examined and the parties hereto having produced, offered in 319
evidence, and given their other documentary evidence affecting the issues herein;

And counsel for the parties having been heard on oral argument and having submitted their briefs to the Court;

And due deliberation having been had thereon and the Court having handed down its decision, in writing, dated January 10, 1933, rendering judgment in favor of the plaintiff and against the defendant, and the Court thereafter having duly made its Findings of Facts and Conclusions of Law on May 16, 1933, wherein and whereby judgment for the plaintiff and 320
against the defendant was therein directed; now, it is

Ordered, Adjudged and Decreed that the plaintiff recover from the defendant, the United States of America, the sum of five thousand dollars ($5,000) damages, the same being insurance money due and payable, under and pursuant to the terms and conditions of the Government Life Insurance Policy No. K812772, herein sued upon; and it is further

Ordered, Adjudged and Decreed that the defendant, the United States of America, deduct ten per cent (10%) of the amount of insurance money, now 321
due and payable to the plaintiff under the terms of this judgment and the said insurance policy here sued upon, and pay the same to Frank C. Huntington, 241 Main Street, Oneonta, N. Y., attorney for the plaintiff, said amount to be paid by the United States Veterans Bureau to Frank C. Huntington out of payments to be made to the Wilber National Bank

of Oneonta, N. Y., administrator of the estate of
322 James Patrick Mahar, deceased, as and for counsel fee allowed herein, pursuant to Section 551 of Title 38, U. S. Code.

Dated Malone, N. Y., May 16, 1933.

(Signed) FREDERICK H. BRYANT,
District Judge.

PETITION, ASSIGNMENT OF ERRORS AND ORDER ALLOWING APPEAL

PETITION

323 UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
Plaintiff,

against

THE UNITED STATES OF AMERICA,
Defendant.

324

LAW No. 1389

To the Honorable Frank Cooper,
Judge of the U. S. District Court for the Northern District of New York:

The United States of America, the defendant herein, by Oliver D. Burden, United States Attorney for

the Northern District of New York, feeling aggrieved by the judgment rendered herein, and entered in this court May 23, 1933, in favor of the plaintiff and against this defendant, and as directed by the United States Attorney General, hereby prays that it be permitted to appeal from the above judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors herewith presented. 325

Dated, Syracuse, N. Y., August 17, 1933.

UNITED STATES OF AMERICA,
By OLIVER D. BURDEN,
U. S. Attorney for the Northern
Judicial District of New York. 326

ASSIGNMENT OF ERRORS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
Plaintiff,
against
THE UNITED STATES OF AMERICA,
Defendant. 327

LAW No. 1389

The United States of America, the defendant in the above entitled cause, files the following Assign-

328 ment of Errors upon which it will rely in the prosecution of the appeal herein petitioned for in said cause from the judgment of this court entered on the 23rd day of May, 1933.

THE COURT HEREIN ERRED:

1. In not granting the motion of the defendant at the close of the plaintiff's case for dismissal of the complaint on the ground that the plaintiff had failed to prove a cause of action herein.

2. In not granting the motion of the defendant for nonsuit and dismissal of the complaint at the close of the testimony in the action on the ground
329 that the plaintiff had failed to prove a cause of action herein.

3. In not granting the motion of the defendant made at the close of the testimony in directing a verdict for the defendant herein.

4. In finding as a fact that the contract of insurance herein was issued on or about September 19, 1927.

5. In making the following Conclusions of Law:

(a) That the United States went into the insurance business, issued policies in familiar form and it must be assumed thereby to have accepted the ordi-
330 nary incidents of suits in such business.

(b) That the United States Government engaged in the life insurance business in competition with private insurance corporations and thereby became obligated to the same rules as to sending notices and applying premiums and obeying customs applicable to private insurance corporations, and has failed to

give notice and keep the insured informed as required by fairness, equity and law. 331

(c) That by its failure to explain its allocation of moneys paid, failure to give notice respecting future premiums, failure to return premiums and funds for many months after it now claims the policy had lapsed, and general failure to provide necessary information and explanation to the insured, the defendant has estopped itself from withholding payment because of alleged lapse.

(d) That the plaintiff is entitled to judgment for $5,000.

6. In refusing to find that, as shown by the evidence, in July, 1927, James Patrick Mahar caused to 332
be reinstated and the defendant did reinstate the said War Risk Insurance policy to the extent and in the amount of $5,000.00 by paying under the regulations duly made one monthly premium of $3.85 for $5,000.00, one-half of the original lapsed contract amount, and the said James Patrick Mahar thereupon converted the said reinstated policy of insurance into a United States Government Life Insurance policy on the Five Year Convertible Term Plan which was issued effective July 1, 1927, in the amount of $5,000.00 and payable to the estate of said insured.

7. In refusing to find that, as shown by the evidence, that at the time of the reinstatement and conversion of said $5,000.00 insurance, said James Patrick Mahar paid the premiums due on said converted insurance policy for the months of July and August, 1927, and which policy provided for monthly pre-

334 miums of $3.95 to be paid by insured the 1st day of each calendar month, and, at option, quarterly, semi-annual, and annual premiums.

8. The Court erred in refusing to find as requested by the defendant

(a) That said policy of insurance lapsed and came to an end for non-payment of premiums on August 31, 1927.

(b) That at the time of the commencement of this action said reinstated and converted policy of insurance was not in force and effect and no payments thereunder were due the plaintiff.

335

9. In refusing to find, as conclusions of law, as requested by the defendant,

(a) That at the time of the commencement of this action the contract of insurance therein sued upon and set forth in the complaint herein had lapsed for non-payment of the premiums due thereon from the plaintiff's intestate, the said James Patrick Mahar, and had terminated and come to an end.

(b) That plaintiff's intestate, the said James Patrick Mahar, was not and did not become permanently and totally disabled at any time while the said converted policy of insurance was in force and effect.

336

(c) That plaintiff's complaint should be dismissed with costs.

Wherefore, defendant prays that the said judgment may be reversed for such other and further relief as the Court may deem just and proper.

Petition, assignment of errors and order allowing appeal

Dated, August 17, 1933.

337

UNITED STATES OF AMERICA,
By OLIVER D. BURDEN,
U. S. Attorney for the Northern
District of New York,
Attorney for Defendant.

ORDER ALLOWING APPEAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

338

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
Plaintiff,

against

THE UNITED STATES OF AMERICA,
Defendant.

LAW No. 1389

339

Upon reading and filing petition of the defendant for an appeal from the judgment entered on the 23rd day of May, 1933, in the above entitled cause, and upon consideration of the assignment of errors filed herein, it is

Ordered that the appeal herein be allowed as prayed for without defendant giving bond, and that a citation issue according to law, and it is

340 Further Ordered that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Second Circuit.

Dated August 17, 1933.

FRANK COOPER,
United States District Judge.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

341 THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
Plaintiff,

against

THE UNITED STATES OF AMERICA,
Defendant.

LAW No. 1389

342 Now comes the above named defendant, the United States of America, feeling itself aggrieved by the decision of the Court, which was entered in the Clerk's office of this court on the 23d day of May, 1933, and does hereby appeal from said decision and final judgment of the Court aforesaid in favor of the plaintiff to the U. S. Circuit Court of Appeals for the Second Judicial Circuit, and prays that a citation issue as provided by law requiring that a transcript of the

record and proceedings on which said decision and final judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that the above named plaintiff show cause, if any, why the aforesaid provisions of final judgment made and entered against said defendant may not be corrected and reversed and why speedy justice should not be done to the parties in that behalf, and for such other and further relief as may be just and proper. 343

Dated, August 17, 1933.

OLIVER D. BURDEN,
U. S. Attorney for the N. D. of N. Y., 344
Attorney for Defendant,
Office and P. O. Address,
Federal Building, Syracuse, N. Y.

To—
Frank C. Huntington, Esq.,
Attorney at Law,
Wilber National Bank Bldg.,
Oneonta, N. Y.
Hon. John W. Hahn,
Clerk, U. S. District Court,
Federal Building, Utica, N. Y. 345

CITATION

346 THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA, }
Second Judical Circuit. } ss.

To: The Wilber National Bank of Oneonta, N. Y., as Administrator of the Estate of James Patrick Mahar, deceased,

Greeting:

347 You are hereby cited and admonished to be and appear in the U. S. Circuit Court of Appeals for the Second Circuit at the City of New York, State of New York, within thirty days from the date hereof pursuant to an order allowing said appeal from the District Court of the United States for the Northern Judicial District of New York, in a suit wherein the United States of America is appellant and you are the appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, and why speedy justice should not be done to parties in that behalf.

348 Witness, the Honorable Frank Cooper, District Judge of the United States, at Albany, New York, within said Circuit, this 17th day of August, in the year of our Lord one thousand nine hundred and thirty-three.

FRANK COOPER,
United States District Judge.

Attest:

JOHN W. HAHN, Clerk,
By G. A. PORTER, Deputy Clerk.

849

Due, timely and personal service of the above citation and copies of notice of appeal, assignment of errors, petition and order allowing appeal, is hereby admitted.

Dated, August 29, 1933.

FRANK C. HUNTINGTON,
Attorney for The Wilber National Bank of Oneonta, N. Y.,
Appellee.

850

851

EXHIBITS

PLAINTIFF'S EXHIBIT 1

THE UNITED STATES OF AMERICA

Government Life Insurance

Policy No. K812772
Amount $5000
Name
James Patrick Mahar

NOTICE

It is not necessary for the Insured or the Beneficiary to employ the agency of any person, firm, or corporation in collecting the insurance under this policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the United States Veterans Bureau, Washington, D. C.

Five Year Convertible Term Policy

745—2-14051—Government Printing Office

Age of Insured 37	Monthly	$ 3.95
	Quarterly	11.80
	Semiannual	23.55
	Annual	46.65

THE UNITED STATES OF AMERICA
Hereby Grants Insurance

Amount of Insurance	of five thousand ($5000) Dollars
To Insured	James Patrick Mahar (the Insured).
Premium	

This insurance is granted in consideration of and subject to the terms and conditions hereinafter set forth, and in further consideration of the payment of the monthly premium of $3.95 on the 1st day of each month for a period of sixty (60) months and thereafter the monthly premium of $10.80 on the 1st day of each succeeding month during the lifetime

of the Insured except as hereinafter provided. Receipt of the first premium is hereby acknowledged.

Mode of Payment at Death or Disability

This insurance is payable in monthly installments of $28.75 (hereinafter called the monthly installment) in the event of the total permanent disability of the Insured or of his death, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the Insured this insurance is payable in accordance with the Optional Settlement so selected.

Beneficiary

This insurance, subject to the beneficiary provisions hereof, is payable to the estate of the Insured, no beneficiary within the permitted class having been designated, hereinafter called the beneficiary, in one sum.

Disability Benefits to Insured

Upon due proof of the total permanent disability of the Insured while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the Insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived.

Death Benefits to Beneficiary

Upon due proof of the death of the Insured while this policy is in force, the monthly installments, without interest, which have accrued since the death of the Insured, the first installment being due on the date of the death of the Insured, shall be paid to the beneficiary designated, and thereafter the payment of the monthly installments shall continue to be so payable until two hundred and forty installments in all, including any paid to the Insured during his lifetime on account of total permanent disability, shall have been paid; but if two hundred and forty or

more installments shall have been paid to the Insured on account of total permanent disability, no
358 death benefit shall be payable. If Optional Settlement 1, 2, or 3 has been selected, payment shall be made accordingly, subject to deduction on account of disability payments.

Place of Payment

All payments under this policy shall be payable at the United States Treasury in the City of Washington, District of Columbia.

Dividends

This insurance shall participate in dividends from gains and savings.

Conditions

The conditions, benefits, and privileges recited on the succeeding pages hereof constitute a part of this
359 contract.

This policy takes effect on the 1st day of July, nineteen hundred and twenty-seven.

FRANK T. HINES, Director,
United States Veterans' Bureau.

Countersigned at Washington, D. C.
Examined and issued September 19, 1927.

M. J. MOORE, Registrar.

745—2-14051 8A

CONDITIONS, BENEFITS, AND PRIVILEGES

Payment of Premiums

360 1. Premiums are due and payable monthly in advance in legal tender of the United States of America to the Treasurer of the United States in the City of Washington, District of Columbia.

(a) Premiums may be paid annually, semiannually, or quarterly, in advance, in which case the premium payable will be the sum of the monthly premiums for the period discounted at three and one-

half per centum per annum. The discounted premiums for these periods are stated on the first page hereof. At maturity by death or otherwise, the discounted value at three and one-half per centum per annum of the premiums paid in advance beyond the current calendar month shall be refunded to the Insured, if living; otherwise to the beneficiary. 361

(b) If any premium be not paid when due, this policy shall cease and become void except as hereinafter provided.

Grace for Payment of Premiums

2. For the payment of any premium under this policy, a grace of thirty-one days without interest will be allowed, during which time the policy will remain in force; but if the policy shall become a claim within the grace period, the unpaid premiums shall be deducted from the amount of insurance payable. 362

Reinstatement

3. This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy. 363

Dividends

4. This policy shall participate in and receive such dividends from gains and savings as may be

determined by the Director of the United States Veterans Bureau. Any dividends so apportioned may
364 be taken in cash, and if not so taken, shall be left on deposit to accumulate at such rate of interest as the Director of the United States Veterans Bureau may determine, but at a rate never less than three and one-half per centum compounded and credited annually, and payable, if not previously withdrawn, at the maturity of this policy to the person entitled to its proceeds.

Nonforfeiture Provisions

5. Cash value, paid-up insurance, extended insurance, and policy loan provisions as follows shall be effective at any time after the completion of the sixth policy year, all values, reserves, and net single
365 premiums being based on the American Experience Table of Mortality, with interest at the rate of three and one-half per centum per annum.

Cash Value

(a) The cash value at the end of the sixth policy year and at the end of any policy year thereafter, for which premiums have been paid in full, shall be the reserve, together with any dividend accumulations. For each month after the sixth policy year, for which month the premium has been paid, the reserve at the end of the preceding policy year shall be increased by one-twelfth of the increase in reserve for the current policy year. Upon written request therefor and upon complete surrender of this policy
366 with all claims thereunder, made by the Insured while this policy is in force, but not later than three calendar months from the due date of the premium in default, the United States will pay to the insured the cash value hereof less any indebtedness.

Paid-up Insurance

(b) If the policy has not been surrendered for

cash, upon default in payment of premium and upon written request of the Insured and complete surrender of this policy with all claims thereunder within three calendar months after the due date of the premium, the United States will issue paid-up insurance for such amount as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the Insured. The paid-up insurance shall be with right to total and permanent disability benefits and with right to dividends. The number of monthly installments payable upon due proof of total and permanent disability or death of the Insured under such paid-up insurance will be the same as would then be payable under this policy. The Insured may at any time surrender the paid-up policy for its cash value, or obtain a loan on such paid-up insurance. 367 368

Extended Insurance

(c) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for cash or for paid-up insurance, this policy shall be extended automatically as term insurance for an amount of insurance equal to the face value of the policy, less any indebtedness for such time from the due date of the premium in default as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the Insured. The extended insurance shall be with right to total and permanent disability benefits and with right to dividends payable in cash only. The number of monthly installments payable upon due proof of total and permanent disability or death of the Insured under such extended insurance will be the same as would then be payable under this policy. The extended insurance shall not have a loan value, but shall have a cash value. 369

Policy Loans

370 (d) At any time after the expiration of the sixth policy year and before default in payment of any subsequent premium, and upon execution of a loan agreement satisfactory to the Director, the United States will lend to the Insured on the sole security of this policy any amount which shall not exceed ninety-four per centum of the cash value, and any indebtedness shall be deducted from the amount advanced on such loan. The loan shall bear interest at a rate not to exceed six per centum per annum, payable annually, and at any time before default in payment of premium the loan may be repaid in full or in amounts of five dollars or any multiple thereof. Failure to pay either the amount of the loan or the interest thereon shall not avoid this policy unless 371 the total indebtedness shall equal or exceed the cash value thereof. When the amount of the indebtedness equals or exceeds the cash value this policy shall cease and become void.

372

6. TABLE OF GUARANTEED SURRENDER VALUES

End of Policy Year	Cash-surrender Value for Each $1,000 of Insurance (Full reserve of policy)	Paid-up Insurance with Disability Benefits for Each $1,000 of Insurance	Extended Insurance with Disability Benefits	
			Years	Days
6	$ 16.06	$ 36.77	1	215
7	32.60	73.05	3	59
8	49.59	108.75	4	244
9	67.06	143.91	6	21
10	84.98	178.43	7	109
11	103.34	212.30	8	140
12	122.12	245.46	9	115
13	141.29	277.86	10	37
14	160.82	309.47	10	275
15	180.68	340.24	11	105
16	200.86	370.19	11	262
17	221.32	399.28	12	20
18	242.02	427.48	12	111
19	262.96	454.85	12	177
20	284.07	481.30	12	219
21	305.34	506.88	12	242
22	326.73	531.59	12	246
23	348.20	555.41	12	235
24	369.72	578.37	12	212
25	391.22	600.45	12	177
30	497.24	698.15	11	258
35	596.50	775.64	10	175

(a) The above values are based on an insurance of $1,000 without indebtedness, and with no dividends standing to the credit of the policy, and no installments having been paid on account of total permanent disability. If this policy provides for a larger amount of insurance than $1,000, the cash value, loan values, and paid-up insurance values will be increased proportionately. The periods of extended insurance as given in the above table are the same irrespective of the amount of the insurance.

Values—First Five Years

7. After this policy has been in force by the payment of premiums for twelve months and before the
376 expiration of the five-year term period, the reserve, if any, together with any dividend accumulations less any indebtedness, may be paid to the insured in cash or used to purchase paid-up term insurance for the unexpired portion of the five-year term period, provided the insured makes written request therefor and surrenders this policy before the expiration of the grace period. If the Insured does not make written request and surrender of the policy before the expiration of the grace period, then the reserve, if any, plus any dividend accumulations, less any indebtedness, will be used as a net single premium to purchase extended term insurance from the due date of the premium in default, but not to extend beyond
377 the termination of the five-year term period. All calculations will be made as provided in paragraphs 5, 5 (a), 5 (b), and 5 (c) of this policy.

Indebtedness at Maturity of Policy

8. At the maturity of this policy by total permanent disability or death, any indebtedness, unless paid off in cash, shall be liquidated by reducing the monthly installment in the proportion which the indebtedness bears to the commuted value of the monthly installments, as may then be payable hereunder, excluding dividend accumulations. If the policy shall be payable in one sum at death, any indebtedness shall be deducted from the amount pay-
378 able under the policy.

Incontestability

9. This policy shall be incontestable after the insurance has been in force for six months from the date of issuance or reinstatement, except for fraud or non-payment of premiums, and the policy is issued free of restrictions as to travel, residence, occupation, or military or naval service. However, no

insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy: *Provided,* That the cash value hereof less any indebtedness on the date of such death shall be paid to the designated beneficiary if living, or if there be no designated beneficiary alive at the death of the Insured, the said value shall be paid to the estate of the Insured. 379

Misstatement of Age

10. If the age of the Insured has been understated, the amount of the insurance payable under the policy shall be such exact amount as the premium paid would have purchased at the correct age; if overstated, the excess of premiums paid shall be refunded without interest. Guaranteed surrender and loan values will be modified accordingly. The age of the Insured will be admitted by the United States Veterans Bureau at any time upon satisfactory proof. 380

Total Permanent Disability

11. Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months, shall be refunded without interest. 381

(a) Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one

hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

382

Recovery From Disability

12. Notwithstanding proof of total permanent disability may have been accepted as satisfactory, the Insured shall at any time, on demand, furnish proof satisfactory to the Director of the United States Veterans Bureau of the continuance of such total permanent disability, and if the Insured shall fail to furnish such proof, all payments of monthly installments on account of such total permanent disability hereunder shall cease, and all premiums thereafter falling due shall be payable in conformity with this policy. Thereafter the premium to be paid, and the cash values, paid-up insurance values, and loan values shall be reduced so that the resulting premium and values shall bear the same proportion to the premium and values, respectively, specified hereon, that the commuted value of the installments (two hundred and forty less the number paid) bears to the commuted value of two hundred and forty installments. The extended-insurance values shall be modified accordingly.

383

384

Total Permanent Disability Benefits
Under Paid-up Insurance

13. If one or more monthly installments be paid on account of total permanent disability incurred under a paid-up insurance, then there shall be paid to the beneficiary upon the surrender of this policy at

the death of the Insured the remaining unpaid installments (two hundred and forty less the number paid). If an optional settlement has been selected, payment shall be made accordingly. 385

Total Permanent Disability Benefits
During Period of Extended Insurance

14. In case total permanent disability occurs during the period of extended insurance and payments are made on account of such disability and recovery from such disability also takes place, then (a) if the recovery takes place before the end of the period of extended insurance, the insurance shall be reduced accordingly, and the insurance, as reduced, shall be continued in force; (b) if the recovery takes place after the end of the period of extended insurance, all rights and claims hereunder shall cease, except as to the privilege to reinstate. 386

Assignment

15. The proceeds of this policy shall not be assignable, except that any person to whom this insurance shall be payable may assign his interest in this insurance to any other beneficiary within the class permitted by the World War Veterans' Act or any amendment or supplement thereto. No such assignment of this policy shall be binding upon the United States unless in writing and until filed in the United States Veterans Bureau, Washington, D. C. The United States assumes no responsibility for the validity of any assignment. The proceeds of this policy shall not be subject to the claims of creditors of the Insured or creditors of any beneficiary to whom the proceeds may be awarded, except claims of the United States arising under the War Risk Insurance Act or the World War Veterans' Act. 387

Exempt From Taxation

388 16. The proceeds of this policy are exempt from all taxation.

Beneficiary

17. The insured shall have the right at any time, and from time to time, and without the consent or knowledge of the beneficiary, to change the beneficiary under this policy within the class of beneficiaries permitted by the World War Veterans' Act or any amendment or supplement thereto. A change of beneficiary must be made by written notice to the United States Veterans Bureau over the signature of the Insured and shall not be binding on the Bureau unless received and indorsed on the policy by
389 the Bureau. A change of beneficiary must be forwarded to the Bureau by the Insured or his agent, and must be accompanied by the policy. A change of beneficiary may be indorsed during the lifetime of the Insured or after his death, and when so indorsed said change shall be effective as of the date the insured signed the written notice of change of beneficiary. The Bureau shall be protected in all payments made to the beneficiary last of record and before receipt of notice of a change of beneficiary, and no payments so made shall be paid again to the changed beneficiary. The Insured may exercise any right or privilege given under the provisions of this policy without the consent of the beneficiary. An original
390 designation of a beneficiary may be made by the last will and testament, but no change of beneficiary may be made by last will and testament.

(a) If no beneficiary within the permitted class be designated by the Insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the Insured, then there shall be paid to the estate of the Insured the present value of the remaining unpaid monthly installments.

(b) If the designated beneficiary survives the Insured and dies before receiving all the installments payable and applicable, then there shall be paid to the estate of such beneficiary the present value of the remaining unpaid monthly installments. 391

(c) Where a beneficiary at the time of designation by the insured is within the permitted class of beneciaries and is the designated beneficiary at the time of the maturity of the insurance because of the death of the Insured, such beneficiary shall be deemed to be within the permitted class even though the status of such beneficiary shall have been changed.

Change to Other Forms

18. This policy may be exchanged for a policy of the same amount, bearing the same date and based on the same age, on any plan of insurance issued by the United States Veterans Bureau at a higher rate of premium, upon payment of the difference in reserve on this policy and the reserve on the new policy. Such exchange will be made without medical examination upon complete surrender of this policy while in force and within five years from the effective date hereof. 392

(a) This policy may be exchanged for a policy of the same amount on any plan of insurance issued by the United States Veterans Bureau at a higher rate of premium, upon payment of the current monthly premium at the attained age of the insured for the plan of insurance selected. The reserve (if any) on this policy will be allowed as a credit on the current monthly premium. Such exchange will be made without medical examination upon complete surrender of this policy while in force and within five years from the effective date hereof. 393

Optional Settlement

19. The Insured may select one of the Optional

Settlements set forth below, but notice of the selection shall not be valid unless and until it is recorded
394 in the United States Veterans Bureau. The Insured may revoke his selection of the Optional Settlement but the revocation shall not be valid unless and until it is recorded in the United States Veterans Bureau. If the Insured does not select one of said Optional Settlements, then he shall be deemed to have made no election, and the insurance shall be payable in two hundred and forty monthly installments, unless an election under Option Two or Option Three is made by the beneficiary.

(a) If the Insured has not made an optional selection, a designated beneficiary or beneficiaries, at the maturity of this policy by death, may select settle-
395 ment under Options Two or Three as set forth below, but the selection shall not be valid unless and until it is recorded in the United States Veterans Bureau. If the Insured has made an optional selection, a designated beneficiary, at the maturity of this policy by death, may elect to receive such insurance in installments spread over a greater period of time than that selected by the Insured.

(b) Settlement under one of these options shall be considered full and complete settlement of all liability under this contract.

(c) The values shown in the following options are based on an insurance of $1,000 without indebted-
396 ness. If there is indebtedness under this policy, or the Insured has received any payments on account of total permanent disability, the value will be decreased accordingly. If this policy increased proportionately.

20. OPTIONAL SETTLEMENTS IN LIEU OF MONTHLY INSTALLMENTS OF $5.75 PAYABLE ON THE DEATH OF THE INSURED UNDER THE TERMS OF THIS POLICY, SUBJECT TO THE BENEFICIARY PROVISIONS HEREOF 397

OPTION ONE

Insurance Payable in One Sum.—Settlement under this option will be made only when selected by the Insured during his lifetime or by his last will and testament. When such selection has been made, $1,000 will be payable in one sum at the maturity of this policy by death.

OPTION TWO

Insurance Payable in Elected Installments.—The installments noted below will be payable for an agreed number of months (not less than thirty-six) to the designated beneficiary, but if such beneficiary dies before the agreed number of monthly installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions hereof.

OPTION THREE

Insurance Payable in Installments Throughout Life.—The installments noted below will be payable throughout the lifetime of the designated beneficiary, but if such designated beneficiary dies before two hundred and forty such installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions hereof. 398 399

400

Number of Monthly Installments	Amount of Each Monthly Installment	Age of Beneficiary at Time of Death of Insured	Amount of Each Monthly Installment
36	$29.19	10	$3.67
48	22.27	15	3.75
60	18.12	20	3.84
72	15.35	25	3.96
84	13.38	30	4.11
96	11.90	35	4.30
108	10.75	40	4.52
120	9.83	45	4.79
132	9.09	50	5.07
144	8.46	55	5.35
156	7.94	60	5.56
168	7.49	65	5.70
180	7.10	70	5.75
192	6.76	75	5.75
204	6.47	Amounts of monthly installments for other ages will be furnished upon request.	
216	6.20		
228	5.97		
240	5.75		

401

Authority

21. This insurance is granted under and subject to the provisions of the World War Veterans' Act, 1924, and amendments and supplements thereto. No person, except the Director of the United States Veterans Bureau may waive forfeitures, or make, modify, or discharge contracts, or extend the time for paying a premium, or bind the United States by making any promise respecting any benefits hereunder.

402

PLAINTIFF'S EXHIBIT 2

(Photo of check)

ONEONTA, N.Y. July - 1 - 192 7 No.

WILBER NATIONAL BANK
OF ONEONTA, N.Y.

50-242

Pay to the United States $13.89

DOLLARS

INSURANCE CASHIER

UNITED STATES VETERANS BUREAU

PLAINTIFF'S EXHIBIT 3

406 PROVISIONAL RECEIPT

United States Veterans Bureau
Insurance Division
Washington, D. C.
United States Government Life Insurance
Unit Number 12 N
Form 773 (Revised Jan., 1927)

Receipt is hereby acknowledged of a remittance in connection with your application for conversion of Term Insurance into United States Government Life Insurance.

407 Date of Application, 7-1-27.
Amount of insurance applied for, 5000.
Plan of insurance applied for
Certificate number
Amount of remittance, 13.90 Ck.

James Patrick Mahar
4 East End Ave
Oneonta N Y

408 Important.—Insurance under the application evidenced by the above remittance shall be effective subject to the World War Veterans' Act, 1924, and Regulations, i. e., provided that previous term insurance be in force, or if lapsed, reinstatement thereof be approved by the Bureau; or if there be no previous term insurance that the applicant be entitled to Government Life Insurance; and that proper amount be tendered to cover the premium and that application be acceptable to the Bureau; otherwise the above remittance will be returned to the depositor.

Government Printing Office—2-9198

Stamped:—Payment received Jul 29 1927 A P Carson Insurance Cashier 409

PLAINTIFF'S EXHIBIT 4

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY

(Seal)

Stamped:
Feb 2-1928 2:55 P. M.
1394
Apr 3-1919
Paid in full 80.00, Camp Upton, L. I. J. E. Adams, 1st Lt. Q. M. C. U. S. A. 410
Otsego County, ss. Recorded on the 2nd day of February 1928 at 2:55 P. M., in Liber 1 of Soldiers Disc. at page 495. Chester T. Backus, Clerk.

To all whom it may concern:

This is to certify, that *James P. Mahar, †1201260 Sergeant 1st Class, Co. A, 102 Engineers,
The United States Army, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of ‡Pursuant to authority contained in W. D. Circular 73 dated Nov. 18, 1918, and letter A. G. O. dated Nov. 19, 1918 (220.81 Camp Upton, N. Y., Misc. Div.). 411

Said James P. Mahar was born in Schobarie, in the State of New York. When enlisted he was 26 years of age and by occupation a R. R. Engr. He

had blue eyes, red hair, fair complexion, and was 5 feet 6 inches in height.

412 Given under my hand at Camp Upton, New York, this 3 day of April, one thousand nine hundred and nineteen.

W. S. Conrow,
Colonel Engineers,
Commanding.

Form No. 525, A. G. O., Oct. 9-18. 3-3164

*Insert name, Christian name first; e. g., "John Doe."

†Insert Army serial number, grade, company and regiment or arm or corps or department; e. g.,
413 "1,620,302"; "Corporal, Company A, 1st Infantry"; "Sergeant, Quartermaster Corps"; "Sergeant, First Class, Medical Department."

‡If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.

(Reverse side)

ENLISTMENT RECORD

Name: James P. Mahar. Grade: Sergeant 1st Class.

Enlisted (or Inducted), June 26, 1917, at Albany,
414 New York.

Serving in First enlistment period at date of discharge.

Prior service: * None.

Noncommissioned officer: Sergeant, Sergeant 1st Class.

Marksmanship, gunner qualification or rating: †Not rated.

Horsemanship: Not rated.

Battles, engagements, skirmishes, expeditions: Guillemont Farm, Hindenberg Line, LaSelle River (St. Souplet), Jonc De Mer Ridge, St. Maurice River, East Poperinghe Line. 415

Knowledge of any vocation: Railroading.

Wounds received in service: None.

Physical condition when discharged: .....

Typhoid prophylaxis completed, Aug. 19, 1917.

Paratyphoid prophylaxis completed Oct. 10, 1917.

Married or single: Single.

Character: Excellent.

Remarks: Entitled to travel pay to Albany, N. Y. Served with American Expeditionary Forces in France, Belgium. Left U. S., May 17, 1918. Arrived in U. S., Feb. 28, 1919. Services honest and faithful. No A. W. O. L. under G. O. 45+90+A. W. 107. Entitled to $60 Bonus, auth. act. of 2/24/19 and Telegram W. D. 2/25/19. 416

Signature of soldier: James P. Mahar.

George Bates,
Capt. Engrs.,
Commanding Co. A, 102 Engrs.

Stamped: L. I. R. R. Apr. 3, '19. Camp Upton.

*Give company and regiment or corps or department, with inclusive dates of service in each enlistment. 417

†Give date of qualification or rating and number, date, and source of order announcing same.

PLAINTIFF'S EXHIBIT 5

418 United States Veterans Bureau
Insurance Division
Washington, D. C.

United States Government Life Insurance

The Bureau is in receipt of your remittance of $3.95, tendered in payment of the premium due September 1, 1927.

James P. Mahar K-812772
4 East End Ave.
Oneonta, N. Y.

419 Your policy provides for a grace period of thirty-one days from the due date, during which time the premium may be paid without interest. Inasmuch as your remittance was not mailed until after the expiration of the grace period, it cannot be credited in payment of the premium until the insurance has been reinstated.

Application for reinstatement of your insurance may be made on the inclosed Form 744, provided it is completely filled in and mailed to the Bureau within three months from the due date of the premium mentioned above. If you have not already forwarded all
420 premiums in arrears, the application must be accompanied by a remittance sufficient to complete all premiums, including the current month, plus interest at the rate of 5% per annum from their respective due dates to the date on which application is submitted.

If reinstatement is delayed beyond the three months period, a report of a full medical examination

must be submitted with the application for reinstatement. It is to your advantage to reinstate immediately. 421

For the Director,
George E. Ijams,
Assistant Director.

Form 772
Incl. 744.
Government Printing Office 2-13872

Premiums thru Jan., 1928	$19.75
Received	10.55
Prem. Bal. due	$ 9.20

422

United States Veterans Bureau
Insurance Division
Form 744—Revised May, 1924

Certificate No. T.....
Policy No. K 812772
Claim No. C.....

APPLICATION FOR REINSTATEMENT OF INSURANCE

This form is to be used only where the applicant applies for the reinstatement of Term or Converted Insurance within three months from due date of the premium in default. If insurance has lapsed for a period longer than three months, application must be made on Form 742 for Term Insurance or Form 807 for Converted Insurance. 423

1. I, the undersigned, hereby apply for the reinstatement of $.....insurance granted to me

under Certificate No. T....., Policy No. K.....,
(Fill in only number applicable)

424 now lapsed on account of the nonpayment of the premium for the month of September, 1927, within the grace period of 31 days. As a condition to the reinstatement of this insurance, I do hereby certify that the answers to the following questions are true to the best of my knowledge and belief, and are made as of the day on which this application is submitted to the Bureau or deposited in the United States mail.

2. Are you now in as good health as you were at the due date of the premium in default?

3. Are you now permanently and totally disabled? (Answer "Yes" or "No").

425 4. Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since lapse of this insurance? (Answer "Yes" or "No.")..... If so, give dates and full particulars, including the name and address of physician .....

5. Have you ever made application for (a) Government Compensation?..... (b) Training allowance?..... If so, give Claim number C.....

426 6. I desire this reinstatement to be effective as indicated by check below (this provision applies to Term Insurance only):

☐ The first day of the month in which requirements have been complied with, or

☐ The first day of the following month.

Regulation 14 provides that TERM insurance shall

be reinstated effective from the first day of the month in which the requirements are complied with by the applicant, or, upon his written request made during such month, from the first day of the following month. 427

Signed .....on this

(City or town) (State)

.....day of....., 192

Witness: ....

(Signature of Witness) (Signature of Applicant)

....

(Address) (Address)

This application should be deposited in the United States mail immediately after execution. 428

Government Printing Office—2-11900

PLAINTIFF'S EXHIBIT 6

No. 71

Chas. E. Houghtaling, Publisher, Albany, N. Y.

A VERIFIED TRANSCRIPT FROM THE REGISTER OF DEATHS

Date of death, December 24, 1927. Register No. 208.

Name of deceased, James Patrick Mahar.

Age, 37 years, 3 months, 27 days. 429

Single, married, widowed or divorced, Married.

Color or race if other than white, White.

Occupation, Railway Car Inspector.

Birthplace, Schoharie, N. Y.

How long a resident—Here, 3 years. In U. S. if foreign.....

Father's name and birthplace, John Mahar, Schoharie, N. Y.

430 Mother's name and birthplace, Mary Mahar, Schoharie, N. Y.

Place of death, Parshall Private Hospital, Oneonta, N. Y.

Cause of death—Chief causes, Chronic cholecyetitis and cholangitis. Other causes, Pulmonary embolism.

Time from attack till death.....

Medical attendant, or other attestant, G. H. Brinkman, M.D.

Place of burial, Mt. Calvary Cem., Oneonta, N. Y.

Undertaker, W. F. Rothery.

481 I Hereby Solemnly Attest, that this is a true transcript from the Public Register of Deaths, as kept in the office of the City Clerk at Oneonta, County of Otsego, State of New York.

Dated at Oneonta, N. Y., the 18th day of April, 1932.

(Signed) W. A. Holley,

Official title, City Clerk and Registrar.

(Seal of the City of Oneonta, etc.)

432

PLAINTIFF'S EXHIBIT 7

(Seal—Veterans Bureau, 1921)

UNITED STATES VETERANS BUREAU
Washington

March 21, 1928.

This letter refers to your file number:
In reply refer to: FA B D—Mahar, James P.—XC-707 911.

Mr. Frank C. Huntington,
Attorney & Counsellor at Law,
Wilber National Bank Building,
Oneonta, New York.

Dear Sir:

Reference is made to your letter of February 29, 1928, relative to the claim for insurance benefits under policy K-812 772 of the wife of the above named insured.

War Risk term insurance in the amount of $10,000 was issued to the former service man upon an application of November 2, 1917. Premiums upon this insurance were paid to include the month of July, 1919. Insurance lapsed for non-payment of premium due August 1, 1919.

Under date of July 1, 1927, the former service man executed an application for the reinstatement of insurance and the conversion of same to a United States Government life insurance policy. This application for reinstatement of insurance, which was approved, was accompanied by a remittance of $13.90. $3.35 of this amount was necessarily applied

to cover the premium on $5,000 term insurance for
436 the month of August, 1919, during which month the insurance was protected by reason of the grace period. This left a balance of $10.55 to be applied as premiums upon the $5,000 converted policy. The monthly premium on this policy was $3.95 so that the amount of the original remittance was sufficient to pay premiums for the months of July and August, 1927, with an overpayment of $2.65. No further premium payments were made by the insured, according to the records of this office, until November 2, 1927. Therefore, the insurance lapsed for nonpayment of premium due September 1, 1927, the
437 grace period for the September premium having expired midnight, October 2, 1927.

Neither the September premium nor the October premium was paid and in fact, no further premium payments were made until that of November 2, 1927, and the only premium payment subsequent to that time was that of December 20, 1927.

The Bureau very much regrets the apparent impossibility of approving the claim for insurance benefits in this case and if you have any evidence to show that the former service man submitted any premium payments other than those which are cited above the Bureau will be very glad to again search the records
438 in this office.

"2"

Mahar, James P.—XC-707 911

Mr. Frank C. Huntington:

In this connection it is suggested that you obtain and forward to this office a certified copy of the pub-

lic record of the death of the insured in order that the file may be complete for further consideration. 439

In reference to the Adjusted compensation claim you are advised that the above named veteran designated his wife, Mrs. James P. Mahar, as the beneficiary of his Adjusted service certificate. Consequently there is enclosed herewith a special "demand for payment" form which should be executed by the above mentioned beneficiary in the presence of a United States postmaster, an executive officer of an incorporated bank or trust company or any person authorized to administer oaths in the community in which the form is executed, and returned to this office. The beneficiary's signature should appear on this form as "Mrs. James P. Mahar." 440

You are further advised that settlement will be made direct with the Wilber National Bank of Oneonta, New York, relative to the loan which they made to the veteran upon the pledge of his Adjusted Service Certificate, and the balance of such certificate will be paid direct to the beneficiary, Mrs. James P. Mahar. This Bureau will communicate direct with the above mentioned bank relative to reimbursing them for the loan which they made to the veteran.

For the director,
George E. Ijams,
Assistant Director. 441

DEFENDANT'S EXHIBIT 1

442 Form G. H. 117, July, 1927—Printed in U. S. A.

Metropolitan Life Insurance Company
(Incorporated by the State of New York)

SUPPLEMENTARY REPORT OF ATTENDING PHYSICIAN

Name of Patient, James Mahar.
Address, 4 East End Ave., Oneonta, N. Y.
Employed by D. & H. R. R. Co.

443 First treated on Oct. 19, 1927, by Doctor E. C. Winsor.

Are you treating patient now? Yes.

Is he physically unable to work at this time? Yes.

Is he confined to the house? No.

If, not why is he unable to work? Catharral jaundice.

Please give a clear and concise statement of his present physical condition and present cause of disability, Catharrhal jaundice with all accompanying general debility.

444 When do you think patient will be able to work? Cannot tell at this date.

Date, Nov. 14, 1927.

Signature, E. C. Winsor.

Stamped—Received Nov. 23, 9 A, Group Claim.

Form O34 Group, Jan., 1923—Printed in U. S. A.

Metropolitan Life Insurance Company

Claim Division—Ordinary Dept.—Group

1/3 8

W. W. Bates, M.

445

PROOF OF DEATH

STATEMENT OF EMPLOYER

City, Oneonta, N. Y.

Group Number 1433. Serial Number 22031. Date of Certificate, June 9, 1925. Amount of Insurance, $1800.00.

To the Metropolitan Life Insurance Company:

This is to certify that James P. Mahar (Name of Employee) died on the 24th day of Dec., 1927, and was in the employ of the undersigned at the date of death.

446

That the deceased had been so employed from Dec. 9th, 1924, to December 24th, 1927. And last reported for work on October 18th, 1927.

Name of beneficiary, Helen B. Mahar. Relationship, Wife. Age, 27. Residence: No. and Street, 4 East End Ave. City or town, Oneonta. State, N. Y.

Employer, D. & H. R. R. Co.

By S. Detmore (Official representative of employer).

447

Dated Dec. 26th, 1927.

Mr. W. W. Bates, Asst. to General Mgr.—P., D. & H. Co., Albany, N. Y.

Send claim check to—(cannot decipher).

ATTENDING PHYSICIAN'S STATEMENT

448 As the company preserves a record of its mortality experience, the report of the attending physician will be of great service if precise and full answers are given to the following questions:

Full name of deceased: James P. Mahar.

Residence: No.: East End Ave. Street. City or town: Oneonta. State: N. Y.

Date of death: Dec. 24, 1927. Age at death: 37. White or colored: White.

Cause of death—Chief or primary: Chronic cholecyetitis and cholangitis. Contributing or secondary: Pulmonary embolism following operation.

449 How long had deceased been ill when you were called to attend? 11 weeks.

Date of first attendance in attendance in last illness: Dec. 21, 1927.

Date of last attendance in last illness: Dec. 24, 1927.

Was death the result of deceased's own hand or act? No.

I Hereby Certify that I attended the deceased from Dec. 21/27 to Dec. 24, 1927; that I signed the certificate on file at the office of the Board of Health or Register of Vital Statistics, and that the answers as

450 above recorded are complete and true to the best of my knowledge and belief.

Signature of physician, G. H. Brinkman.

Dated Dec. 26, 1927.

Residence: No. and Street, 3 Grand St. City or town, Oneonta. State, N. Y.

Note:—If no attending physician, or in case of

sudden death by accident or otherwise, attach certified copy of the record of death as shown by the books of the Health Department, Registrar, County Clerk or other officer having charge of such records. 451

Form G. H. 24C. D. & H., June, 1926—Printed in U. S. A.—O. K.

Premiums must be regularly paid while drawing benefits

Metropolitan Life Insurance Company
(Incorporated by the State of New York)

Group Division

To be completed by the insured

After this form has been completed by you and by your attending physician please send to your employer. 452

Claim No. 72548

For Home Office Only

Serial 2031. Group 1GSWH
Date of cert., xxx. Age, 37. Sex, M.
First day out, 10-19-27. Benefit due 10-26-27.
Weekly benefit $15. First pay't made 11-10-27.
Amount $30. For 2 weeks.....days.
Date of last pay't 12-24-27. Total paid $128.57.
Covering 8 weeks 4 days.
Died. 453
Stamped—H. O. 1.
Full name, James P. Mahar.
Address, No. 4 East End Ave. Street. City, Oneonta. State, N. Y.
Employed by D. & H. R. R. Co. In the capacity of car inspector.

Insured under policy number (1433 crossed out) 1 G. S. H. Serial number 22031.

454 1. Age, 37. Single, married, Married. Color, White.

2. Are you unable to do any and every part of your work? Yes.

3. If able to perform some of your duties, what are they?.....

4. When were you first treated by a physician, Oct. 19, 1927.

5. Name and address of physician, Dr. Winsor, name. Schenevus Street, N. Y. City or state.

Stamped—Approved 11/8, 1927. W. W. Bates, Assistant to General Manager. M.

455 6. If disability was caused by accident, tell how accident happened..... Were you at work when accident happened..... Where and when did accident happen? Place..... Time ..... Date.....

7. Are you receiving benefits for this disability from any society, lodge or other organization? No.

8. If so, name organization and state how much and for how many weeks will benefit be paid?.....

9. When were you first unable to work? Oct. 19, 1927, at 3 o'clock P. M.

456 10. Where were you at that time? Home.

11. When do you expect to be able to perform your duties? About Nov. 10, 1927.

I affirm that the above statements are true and complete to the best of my knowledge.

James P. Mahar, Claimant.

Dated Oct. 26, 1927.

To Be Completed by the Attending Physician

Please complete statement below and on reverse side of this form furnish any additional information you deem advisable to report. 457

This is to certify that I first treated Mr. James P. Mahar at Schenevus, N. Y., on Oct. 19, 1927, at 1:00 o'clock P. M. for catarrhal jaundice (Please give full statement of cause for disability) complicated with .....that he (He or she) has since been continuously under my care, and that he(He or she) is totally (Totally or partially) unable to perform his (His or her) duties.

I expect that insured will be able to return to work on or about Nov. 9, 1927.

E. C. Winsor, M. D.,.....Address. 458

Dated.....19.....

O. K.—Stamp.

Stamped—Received Nov. 8, 12 M. Group Claim.

To Be Completed by the Employer

This is to certify Mr. James Mahar is employed by the undersigned as car inspector. That he (She deleted) has continuous service with this company since 12-9-1924. The last day worked was 10-18, 1927, and the first day absent was 10-19, 1927. Average earnings for the past four weeks $40.00 per week.

If disability is due to accident sustained in course of regular duties, give full particulars..... 459

Has accident been reported to the State Board or Commission acting under the State Workmen's Compensation Law?..... If so, when?.....

Has an award been made?..... How much

per week? $..... How many weeks?.....
460 Has employee returned to work? No. If so, exact date?..... Have you any reason to question the validity of this claim?..... If so, give particulars.....

W. R. Dunbar, D., Employer.

Date Oct. 27, 1927.

Stamped—Master car builder.

Form G371, July, 1927—Printed in U. S. A.
12-10 117

Notice to medical examiner: This form to be used only by a Duly Appointed Medical Examiner of the company. In case the medical examiner is also the
461 attending physician, please refer to another duly appointed examiner for completion. Please Act Promptly.

MEDICAL EXAMINER'S REPORT—SICKNESS OR ACCIDENT

to the

Metropolitan Life Insurance Company

Group Division

Stamped—Doctor's fee allowed. Date 11-29-27. By A. H. T.

1. Name of insured, James P. Mahar—Serial No.
462 22031-1GSH.

2. Address, 4 East End Ave., Oneonta, N. Y.

3. Insured under Group Health and Accident Contract of Delaware & Hudson Co.

4. State where examination was made. At his home? His place of business? Your office? Or where? Patient's home.

5. State name and address of attending physician, Dr. E. C. Winser, Schenevus, N. Y.

463

6. Describe signs and symptoms as now found by you on personal examination, Marked jaundice.

7. If no evidence of injury or sickness exists, so state and give history from insured as to cause of disability for which this claim is being made.....

8. What is the exact nature of injury or disease responsible for this disability? (Give your own diagnosis), Catarrhal jaundice, catarrhal jaundice (obstructive).

9. How long will he be confined to house solely by this injury or sickness? From Oct. 19, 1927, to ?, 19.....

464

10. If not confined to house, how does he spend his time? Walks about for exercise.

11. How long will he be totally disabled from performing any and every kind of work in his occupation (your opinion)? From Oct. 19, 1927, to Dec. 15 (?), 1927.

12. If totally disabled but not confined to house, explain why he is unable to work, Lose strength, weak on exertion.

13. Is claimant, in your estimation, receiving proper and sufficient treatment to bring about earliest possible recovery? Would advise colonic injections, X-ray of gall bladder, etc., for definite diagnosis.

465

14. Is there any disposition to exaggerate or to remain away from work unnecessarily? No.

15. If, in your opinion, claimant is sufficiently recovered to return to work, please indicate to claimant

your views and protest against any further disability.....

466 Stamped—Received Nov. 29, ..., Group Claim.

Date examined, Nov. 26, 1927. Signed, LeRoy S. House, M.D. (Medical Examiner for Company).

Address, 27 Watkins Ave., Oneonta, N. Y.

Important — The Metropolitan Life Insurance Company desires that you inform the claimant you are making this examination at the request of the insurance company.

DEFENDANT'S EXHIBIT 2

467 Stamped 0-0044

United States Veterans Bureau, Insurance Division
Form 742—Revised Dec., 1924

APPLICATION FOR REINSTATEMENT OF YEARLY RENEWABLE TERM INSURANCE

Stamped—K 812772

Applicant must fill out and sign the first page of application for reinstatement in every case. If insurance has lapsed for more than three months, including the grace month, the report of the medical examination on reverse side of this form is also re-

468 quired.

1. My name in full (First, middle, last name), James Patrick Mahar.

2. Certificate number, T-T366571.

3. My home address (Street and number, city, town, or post office, state), 4 East End Avenue, Oneonta, New York. Mailing address, 4 East End Avenue, Oneonta, New York.

4. I hereby apply for the reinstatement of $5,000 Term Insurance granted to me under the provisions of the War Risk Insurance Act, or the World War Veterans' Act, 1924, now lapsed on account of the nonpayment of the premium for the month of May, 1919, within the grace period of 31 days. As a condition to the reinstatement of this insurance, I do hereby certify that the answers to the following questions are true to the best of my knowledge and belief, and are made as of the day on which the application is submitted to the Bureau or deposited in the United States mail. 469

5. Are you now in as good health as you were at the due date of the premium in default? Yes.

6. Are you now permanently and totally disabled? (Answer "Yes" or "No.") No. 470

7. Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since lapse of this insurance? (Answer "Yes" or "No.") No. If so, give dates and full particulars, including the name and address of the physician .....

8. Have you ever made application for (a) Government compensation? No. For what disability? ..... (b) Training allowance? No. If so, give Claim No. C..... 471

9. I desire this reinstatement to be effective as indicated by check below: X—The first day of the month in which requirements have been complied with, or ☐—The first day of the following month.

Regulation 14 provides that Term insurance shall

be reinstated effective from the first day of the month in which the requirements are complied with by the applicant, or, upon his written request made during such month, from the first day of the following month.

472

10. Premiums Tendered With Application:

(a) For first month of lapse.....$ 6.70

(b) For month of July, '27, reinstatement of Term Insurance 3.35

(c) Advance premium on Term Insurance $5,000 ..... 3.85

(d) For first payment on ($5,000 deleted) Government (converted) insurance..... ($3.85 deleted)

473

Total $13.90

Remitted by Check.

Use (b), (c), (d), as they may apply to your case.

Signed at Oneonta, New York, on this 1st day of July, 1927.

(Signature of applicant) James P. Mahar.

Witness: Donald H. Grant.

For Central Office Use Only

(Do not write in this space)

Received.....

Approved..... Date.....

474

Rejected..... Date.....

Insurance Medical Section:

Reinstated. Corrected Receipt Issued.

(Date) (Initials) (Date) (Initials)

Stamped—Acceptable under Regulation 14 and 15. By Dr. A. J. McIntyre, Ins. Medical Section. Date 8-9-27. Lay Exam. A. J. M.

The law provides that "Whoever * * * makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both." 475

This application should be deposited in the United States mail immediately after execution.
c2-10201

(Reverse side)

Stamped—9 1213

MEDICAL EXAMINATION

(This examination is necessary only where insurance has lapsed for a period of more than three months.) 476

1. Applicant's Own Statement

1. Date of birth, Aug. 28, 1890.
2. Place of birth, Schoharie, New York.
3. Race, White.
4. Single, married, or widowed, Married.
5. Family record—

Father—Age if living, 69. Health good or bad (if not good, give full details), Good. Age at death, ... Cause of death..... Year of death.....

Mother—Age if living..... Health good or bad ..... Age at death, 36. Cause of death, Childbirth. Year of death, 1897. 477

Sister—Age if living, 35. Health good or bad, Good. Age at death..... Cause of death..... Year of death.....

Sister—Age if living..... Health good or bad ..... Age at death, 3. Cause of death, Diphtheria. Year of death, 1888.

Brother—Age if living, 41. Health good or bad, Good. Age at death..... Cause of death.....

478 Brother—Age if living, 39. Health good or bad, Good. Age at death..... Cause of death.....

6. What operations have you had? Describe fully, giving dates, None.

7. Have you ever used wines or liquors to excess? No.

8. Have you ever used opium, morphine, cocaine, or other habit-forming drugs? No.

9. What is your occupation? Car inspector.

10. Are you now in good health? Yes.

11. Have you ever been treated for any disease of

479 brain or nerves, No. Throat or lungs, No. Heart or blood vessels, No. Stomach, liver, intestines, No. Kidney or bladder, No. Genito urinary organs, No. Skin, No. Glands, No. Ear or eye, No. Bones, No. (Answer each "Yes" or "No." If "Yes" describe fully and give dates.).....

Signed by applicant in the presence of medical examiner on this 1st day of July, 1927.

(Signature of applicant) James P. Mahar.

c2-10201

2. Medical Examiner's Report

(Examination not acceptable if made by a relative

480 of applicant.)

1. Height in shoes, 5 ft. 6 in.

2. Weight, coat and vest off, Est. 180 lbs. or weighing 189 lbs.

3. Girth of chest, normal, 40 in. Forced expiration, 39 in.; forced inspiration, 43 in.

4. Girth of abdomen, 35 in.

5. State pulse rate: (a) Before exercise, 70. (b) Immediately after, 76. (c) One minute after, 76. (d) Two minutes after, 70.

481

6. Blood pressure (See Note): Systolic, 120. Diastolic, 65. Instrument used, Bannonometer.

7. After examination do you find any abnormality of the heart? No. Is it irregular? No. Does it intermit? No. Is there a murmur? No. (If any heart disability is found or suspected, complete Special Heart Examination on reverse side.)

8. Has applicant's weight increased recently? No. Diminished? No. If so, state cause, how much, and within what period.....

9. After examination, do you find any abnormality of the lungs? No. (Afternoon temperature is required in slender person with suspected tuberculosis tendency or with suspicious signs.) Obtain a careful history of every so-called pleurisy case with special reference to duration, effusion, and what disease is followed. Record the facts here. If tuberculosis is found or suspected, complete the Special Tuberculosis Examination on reverse side.....

482

10. After an examination do you find any abnormality of the nervous system? No. Skin? No. Ear? No. Eye? No. Abdomen? No. Or digestive system? No. (Answer each "Yes" or "No." If "Yes" describe fully.).....

488

11. Urinalysis: Specific gravity, 1020. Albumin, No. Casts, No. Reaction, Acid. Sugar, No. Test used, Haines. Have you knowledge that the urine examined was passed by the applicant at the time of examination? Yes.

12. Has applicant ever had syphilis, gout, or rheumatism? No.

484

13. Any defects in the sight or hearing? No.

14. Any deformity or departure from normal in any respect? No.

15. Has the applicant lost an eye, hand or arm, foot or leg? No.

16. Is the ability to work impaired in any way? If so state particulars, No.

17. Is the applicant ruptured? No. Is it reducible?..... Is a suitable truss worn?.....

18. How long have you known applicant? 1st meeting. By what means are you satisfied as to the identity of the person examined?..... Give some mark of identification, Birthmark back, lumbar region.

485

19. Are you related to applicant? No.

20. Was this examination made at your home or office, or at applicant's home? State place and address, Office.

21. Do you recommend acceptance of the risk? Yes. 1st Class Risk, √. Fair Risk..... Poor Risk.....

22. Are answers to questions of medical examination in your own handwriting? Yes.

23. Females: Any history of uterine or ovarian diseases?..... Married: If pregnant, month advanced..... Date of last confinement? Was it normal?..... Number of miscarriages, if any, and dates.....

486

24. Are you satisfied that everything has been fully stated regarding the physical condition, habits, personal and family history of the applicant? Yes.

Examination of James P. Mahar made and signed this 1 day of July, 1927, New York (Name of State in which you are licensed to practice medicine). 487

George W. Augustine (Signature—Official designation).

Oneonta, New York.

Notes.—Blood pressure is required (a) when applicant is more than thirty years of age, (b) in all cases where there is a family history of apoplexy, heart disease, or nephritis; or where there is a personal history of gout, rheumatism, syphilis, heart disease, or any evidence of kidney disease.

The law provides that "Whoever * * * makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both." 488

c2-10201

(Reverse side)

Stamped—9 1213

Stamped—Mail Sub-Div., M. & R. Div., U. S. V. B., 12.30 o'clock, July 2, 1927, R. No. 4.

SPECIAL TUBERCULOSIS REPORT

Temperature..... Pulse..... Time of examination..... Height .....in. Weight (without coat).....pounds. Did you weigh the man yourself?..... Normal (Man's statement) ..... Highest (Within 1 year, date)..... pounds. Lowest (Within 1 year, date)..... pounds. Sputum (positive or negative)..... If positive, how many specimens were examined? 489

Examination of Chest

490 Shape..... Mobility.....

Palpitation—Fremitus.....

Percussion—R. lung..... L. lung.....

Auscultation—R. lung..... L. lung.....

(No examination is acceptable without auscultation during normal inspiration, following expiratory cough.)

Summary—Indicate areas of infiltration, consolidation, etc., lobe by lobe..... Indicate location and size of cavities, if present..... Is applicant bedridden?..... If so, since what date?..... Are any other parts of body involved besides the lungs?.....

491 Diagnosis—Condition—Active, quiescent, apparently arrested, or arrested. (Underscore the condition found.) Stage — Incipient, moderately advanced, or far advanced. (Underscore the stage found.)

How long has applicant been ill with tuberculosis? .....

Is applicant permanently totally disabled?.....

SPECIAL REPORT OF HEART AND BLOOD VESSELS

492 If a murmur is found state location and time..... Where transmitted?..... Functional or organic..... Probable cause..... Any history of rheumatism or infectious disease..... Any enlargement, dilatation, or hypertrophy..... Measurements..... Probable cause of enlargement..... Dyspnœa..... How severe..... Edema of extremities or lungs

..... Cyanosis..... Condition of arteries..... If bradycardia or tachycardia exists give cause..... Is there any evidence of kidney disturbance.....

Examination made and signed this.....day of....., 192

.....(State in which licensed to practice medicine.)

.....(Signature). (Official designation.)

(Address.)

c2-10201—Government Printing Office.

493

DEFENDANT'S EXHIBIT 3

494

Treasury Department, Bureau of War Risk Insurance—Form 1111

8N—Unit No. 9-1213

RECEIVING TELLER'S REGISTER OF INSURANCE PREMIUM RECEIPTS ISSUED

August 5, 1927 (Date). K. Applications. N. (Teller).

c2-8508

Name of Insured or Certificate No.—Twist, Ernest S., T-89207. Amount, 19.45—3.75 P. H. mac 4969.

Name of Insured or Certificate No.—Montgomery, Jean P., T-173890. Amount, 7.00—3.55 T. mac 5311.

495

Name of Insured or Certificate No.—Krumpeck, Fred R., T-265904. Amount, 40.60—.65 F mac 5470.

Name of Insured or Certificate No.—Banks, Vere J., T-272887. Amount, 20.63—.67 P. mac 5377.

Name of Insured or Certificate No.—Mahar, James P., T-366571. Amount, 13.90—3.35 F. mac. 5302.

* * *

(Follows further list of names.)

REMITTANCE LISTING SHEET

496 Stamped—7 2909

United States Veterans Bureau, Insurance Division Form 830

Stamped—Received Jan. 7, 1928, K-Section 5. Cashier's Repres.

Certificate Number	Amount
8,122.24	1.74
23.99	10.12
26.81	17.20
27.72	3.95

* * *

(Follows further list of accounts.)

497

REMITTANCE LISTING SHEET

49

United States Veterans Bureau, Insurance Division Form 830

Stamped—6 5022

Certificate Number	Amount
8,081.83	18.10*
92.93	7.80
84.74	3.75
83.56	52.80
88.42	18.10
498 88.47	3.65
93.53	20.60—Rfd. 2551 12-8-28 P
93.56	2.16
95.78	9.76
97.22	7.30

97.26		5.20	
97.74	8-3-28	3.55—3.40 H Rfd. 93398	499
99.41	3-23-28 E	14.55—Pfd. 85019	
8,100.32		13.45	
56		7.40	
98		8.40	
1.31		4.10	
1.93		3.65	
4.48		10.90	
2.01		7.00	
2.42		4.38	
2.51		4.74	
2.57		10.08	
7.40	1-23-28 H	1.50—Rfd. 78318	500
7.43		4.12	
		247.04S	

Certificate Number	Amount	
8,107.50	6.76	
7.72	6.80	
8.30	7.75	
9.10	12.12	
9.65	2.43	
10.19	2.67	
14.61	4.20	
15.21	6.90	
16.73	5.00	501
17.05	7.10	
20.60	2.38	
21.19	5.23	
21.48	13.48	
22.31	3.75	
23.21	3.76	

14.78	7.10
14.41	4.34
24.88	1.88
25.48	3.60—Rfd. 5917 1-16-29 E
26.76	5.28—Short 11-29-27 B
27.72	3.95
28.49	8.49
29.07	12.50
29.16	23.90
	408.41*

502

Stamped—Nov. 18, 1927.

503

63#

2-10098 Sep. 52—N. OP.—M. OP.—CK. 58

Stamped—6 5022 4

CASHIER'S REPRESENTATIVE'S RECORD

Unit List No..... Received.....A. M.

.....P. M....., 192

Del'd to Head Cashier's Rep.....A. M.

.....P. M....., 192

Number of Pieces of Correspondence.....

Notices Rejected.....

Government Printing Office—2-10098

504

No. K 812772

C 707911 XC#707911

Name, Mahar, James Patrick

Address, 4 East End Ave., Oneonta, N. Y.—8

Premium, 8.95. Mode, M. Amount, 5000. Plan, 5 Ct. Effective Date, 1927 July 1. Birth Date, 1890/8/28. Age, 37. Original Certificate No.,

366571. Amount of Other Ins..... Number.....

Year 1926—Jan..... Feb..... Mar..... 505
Apr..... May..... June..... July.....
Aug..... Sept. 772 sent 1-9-28. Oct..... Nov.
..... Dec..... Dividend.....

Year 1927—Jan..... Feb..... Mar.....
Apr..... May..... June X July 7-1 1055 9-1213
Aug. 9-12-13 Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1928—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1929—Jan..... Feb..... Mar..... 506
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1930—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1931—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug. Died 12/24/27 Sept..... Oct..... Nov.
..... Dec..... Dividend.....

Year 1932—Jan..... Feb..... Mar..... 507
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1933—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....

Dec..... Dividend.....

508 Year 1934—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1935—Jan..... Feb..... Mar .....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Suspense Remittances—

Date, 7-1. Unit No., 91213. Amt. (10.55 deleted); (13.90 deleted). Over, 2.65. Short.....
Disposition, (3.35 deleted) Mac 5302.

509 Date, 11-2. Unit No., 6-5022. Amt., 3.95. Over ..... Short..... Disposition.....

Date, 12-20. Unit No. 7-2909. Amt., 3.95. Over ..... Short..... Disposition.....
—Letter 1/21/30.

United States Veterans Bureau—Insurance Division —Premium Record Card—Form 794—(Rev. Jan., 1922).

2-10067—U. S. Government Printing Office: 1927

Allotment effective..... Allotment discontinued..... Date of discharge.....

Name of Beneficiary, Estate No. bene. desig. Relationship..... Share.....

510 Surrendered..... Option..... Amt. or Period..... Date.....

Loans..... Number..... Amount ..... Maturity..... Paid.....

Dividend Deposits—Date..... Amount ..... Withdrawn.....

Changes—Nature..... Date.....
Number.....
Claims—Death..... Disability.....
Miscellaneous Receipts—Nature..... Date
..... Unit No..... Amount.....
Remarks.....
Stamped—Received Premium (cannot decipher), Jan. 27, 1928, Computing Section, Awards Division.

511

1917, Nov.
Plate made C-707-911
Mahar, James Patrick S N 1201260, Name
366571, Policy No.
A 102 Engrs., Organization. Pvt., Rank
(Cherry Valley, deleted) Seward, Scho. Co., N. Y.,
Home Address. 27, Age nearest birthday
10000, Amount of insurance. 33, Mode term. .....
Cause of Death—Disability
(E) 11-2-17—R NF—(D) 4-3-19 95-A
2-3951

512

513

	Month	Amount Due	Amount Collected	Month	Amount Due	Amount Collected
514	1917			Nov.	.....	.....
	Oct.	.....	.....	Dec.	.....	.....
	Nov.	6.70	.....	1920		
	Dec.	.....	.....	Jan.	.....	.....
	1918			Feb.	.....	.....
	Jan.	.....	.....	Mar.	.....	.....
	Feb.	.....	.....	Apr.	.....	.....
	Mar.	.....	.....	May	.....	.....
	Apr.	.....	.....	June	Died 12/24/27	
	May	.....	.....	July	.....	.....
	June	.....	.....	Aug.	.....	.....
	July	.....	.....	Sept.	.....	.....
515	Aug.	.....	.....	Oct.	.....	.....
	Sept.	.....	.....	Nov.	.....	.....
	Oct.	.....	.....	Dec.	.....	.....
	Nov.	.....	.....	1921		
	Dec.	.....	.....	Jan.	.....	.....
	1919			Feb.	.....	.....
	Jan.	.....	.....	Mar.	.....	.....
	Feb.	.....	.....	Apr.	.....	.....
	Mar.	.....	.....	May	.....	.....
	Apr.	.....	*	June	.....	.....
	May	.....	4-15	July	.....	.....
			13.40	Aug.	.....	.....
516	June	.....	June 10	Sept.	.....	.....
		A 10c		Oct.	.....	.....
	July	e80	June 10	Nov.	.....	.....
			Mac 5302	Dec.	.....	.....
	Aug.	A 30c	3.35	1922		
	Sept.	.....	.....	Jan.	.....	.....
	Oct.	.....	.....	Feb.	.....	.....

Month	Amount Due	Amount Collected	Month	Amount Due	Amount Collected
Mar.	.....	.....	July		Conv. 5000
Apr.	.....	.....	1927		
May	.....	.....	Aug.	.....	.....
June	.....	.....	Sept.	.....	.....

517

Record of Premiums Paid, Treasury Department, Bureau of War Risk Insurance, Division of Military and Naval Insurance—Form 23.

Stamped — Received, Premium Rec. (cannot decipher), Jan. 27, 1928, Computing Section, Awards Division.

518

519

ORDER

520

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

521

LAW No. 1389

On reading the affidavit of B. Fitch Tompkins, Assistant United States Attorney, and consent of the appellee and for good cause shown, it is

Ordered, that the appellant's time to docket the case, print and file the record thereof in the Second Circuit Court of Appeals is hereby enlarged and extended to November 1st, 1933.

Dated, September 15th, 1933.

522

FRANK COOPER,
United States District Judge,
Northern District of New York.

Timely notice admitted and consent to entry given.
FRANK C. HUNTINGTON,
Attorney for Plaintiff.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

523

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

LAW No. 1389

STATE OF NEW YORK,
County of Onondaga,
City of Syracuse. } ss.

524

B. Fitch Tompkins, being duly sworn, deposes and says, he is an Assistant United States Attorney for the Northern Judicial District of New York, having in charge the prosecution of the appeal in this above mentioned case.

That the order allowing appeal with other papers herein was signed August 17th and entered August 21st, 1933, and citation issued returnable in thirty days. That deponent finds that numerous exhibits were used on the trial and were returned to the respective parties, that the Government exhibits were returned to the Veterans' Administration file which was in Washington pending decision as to appeal; that it will be impossible to collect these exhibits in time for printing the record in the case within the thirty day period specified in the citation.

525

Deponent asks that an order be made enlarging

the time to docket the case and print and file the record thereof to the 1st day of November, 1933.

526

B. F. TOMPKINS.

Subscribed and sworn to before me this 12th day of September, 1933.

OLIVER D. BURDEN,
Notary Public.

Similar order extending time to November 30th entered October 31st, 1933.

---

527 Similar order extending time to December 20th dated November 29th and signed by Judge Frederick H. Bryant.

STIPULATION RE CERTIFICATION

It is hereby stipulated that the foregoing printed copy is a true transcript of the record on appeal as agreed to by the parties.

Dated, December 8 ~~th~~, 1933.

FRANK C. HUNTINGTON,
Attorney for Appellee.

528 OLIVER D. BURDEN,
United States Attorney,
Attorney for Appellant.

Upon the foregoing stipulation and the foregoing printed Bill of Exceptions and Transcript of Record, containing all the evidence, exhibits and proceedings had upon trial of this action, as agreed upon by the parties hereto, the same is hereby settled and ordered filed with the Clerk of the United States District Court for the Northern District of New York and in lieu of the original papers for the purpose of certifying the record on appeal. 529

Dated, Syracuse, N. Y., December 12., 1933.

FREDERICK H. BRYANT,
U. S. District Judge.

530

CLERK'S CERTIFICATE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant. 531

LAW No. 1389

UNITED STATES OF AMERICA,
Northern District of New York } ss.

I, John W. Hahn, Clerk of U. S. District Court for

the Northern District of New York, do hereby certify that the foregoing and annexed printed copy
532 has been presented to me with a stipulation by the attorneys for the parties, that such printed copy is a true transcript of the record on appeal herein as agreed to by the parties, and I do hereby certify the same to be the transcript of record on appeal herein.

In Testimony Whereof I have hereunto set my hand and caused the seal of the District Court of the United States for the Northern District of New York to be hereunto affixed at the City of Utica in said District on this 12 day of December, 1933.

538 JOHN W. HAHN,
Clerk.

(Seal of the Court)

534

[fol. 179] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 315

Argued February 9, 1934. Decided March 5, 1934

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of James Patrick Mahar, Deceased, Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, Defendant-Appellant

Appeal from the District Court of the United States for the Northern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Suit by the Wilber National Bank of Oneonta, N. Y., as administrator of the estate of James Patrick Mahar, deceased, against the United States on a policy of insurance. Judgment for plaintiff; defendant appeals. Reversed.

Oliver D. Burden, U. S. Atty., of Syracuse, N. Y., Will G. Beardslee, Director, Bureau of War Risk Insurance, of Washington, D. C., and Wilbur C. Pickett, Sp. Asst. to Atty. Gen., for the United States.

Frank C. Huntington, of Oneonta, N. Y. (Sterling P. Harrington, of Oneonta, N. Y., of counsel), for appellee.

MANTON, Circuit Judge:

The appellee brought this action, as administrator of the estate of the deceased, to recover upon a contract of the United States government life insurance issued effective July 1, 1927. The deceased was a World War veteran and held a war risk term insurance policy for $10,000, which lapsed August 31, 1919, through failure to pay the premium on August 1, 1919. In June, 1927, he applied for reinstatement of $5,000 of this insurance to be effective July 1, 1927. The requirements of reinstatement were payment of premiums on the $5,000 policy he desired rein-

stated for the lapsed month of August, 1919, which was $3.35, and one month's premium on the converted policy, $3.95.

About July 1, 1927, the insured remitted his check for $13.90 to pay for the lapsed month and for the months of July and August, 1927, and left a credit of $2.65 to be applied on account of $3.95 to become due September 1. The United States issued a receipt, dated July 29, 1927, for the remittance which contained the following clause:

"Important.—Insurance under the application evidenced by the above remittance shall be effective subject to the World War Veterans' Act, 1924 and Regulations, i. e., provided that previous term insurance be in force, or if lapsed, reinstatement thereof be approved by the Bureau; or if there be no previous term insuranec that the applicant be entitled to Government Life Insurance; and that proper amount be tendered to cover the premium and that application be acceptable to the Bureau; otherwise the remittance will be returned to the depositor."

The policy was issued September 9, 1927, and received by the insured shortly thereafter. The insured was not advised as to how his remittance of $13.90 had been applied. On November 2 and December 20 remittances of $3.95 were sent and no acknowledgment or receipt was made until after the death of the insured. In September the insured became ill, and on October 17, 1927, he became incapacitated and died December 24, 1927. After his death an undated receipt for the $3.95 with the words, "tendered in payment of the premium due September 1, 1927," was received.

[fol. 180] The appellee claimed the insurance. The claim was refused on the ground that the insurance had lapsed for nonpayment of premium due September 1, 1927. The grace period for September lapsed October 2, 1927.

Veterans' Bureau Regulation 14, subd. 2, declares the premium due on the 1st day of the month; if not paid when due, the insurance shall lapse as of that date, except that section 14, subd. 3, provides that the premium may be paid thereafter at any time within 31 days, exclusive of the due date, which shall constitute a grace period for the payment of such premium. During such grace period the insurance shall remain in force.

The court below held that the government was estopped from denying that the policy was not in effect on the date of the insured's death, by its conduct, and therefore granted a recovery. It is the appellee's contention that the United States government is bound by the act of its agents in the same manner as any other insurer, and that by electing to receive the premium for September it waived any right it might have had to insist upon a cancellation of the policy for failure to pay the premium due on September 1st; that it thereby made the policy in full force during September and October.

The conditions of the policy relating to premium payments were not met by a payment of the premium due September 1, 1927, and the insurance policy therefore expired counting in the grace period on October 2, 1927, unless there was a waiver by the appellee. The claim that there was such a waiver cannot be sustained. Crawford v. United States, 40 F. (2d) 199 (C. C. A. 2).

In Raives v. Raives 54 F. (2d) 267 (C. C. A. 2), the policy provided for incontestability after six months except for nonpayment of premiums, but, because the policy did not give the government the right it had by statute—contestability for fraud—this court declared the policy not binding on the government when fraud had been practiced. The United States is bound by its agents only to the extent that it consents to be so obligated. In Birmingham v. United States, 4 F. (2d) 508 (C. C. A. 8), it was held that the government cannot be bound by waiver of any of the provisions of the policy by the acts of its agents. The government is not to be regarded as an ordinary insurance company. An agent of the United States has no power to place liability upon it by an act of omission which he could not do by commission. This is so firmly settled as to forbid holding that, when the government entered a new field, it broadened the powers of employees to bind the government where they had no such power in other fields. Therefore there was no estoppel, and the policy lapsed by nonpayment. U. S. v. Loveland, 25 F. (2d) 447 (C. C. A. 3).

In Standard Oil Co. of N. J. v. United States, 267 U. S. 76, 45 S. Ct. 211, 69 L. Ed. 519, the court held that the United States was liable for the loss of the vessel, since the government had insured against war risk. In deter-

mining whether the United States was also liable for interest, Justice Holmes declared that, when the United States went into the insurance business, issued policies in familiar form, it must be assumed to have accepted the ordinary incidents of suits in such business. But in the subsequent case of White v. United States, 270 U. S. 175, 46 S. Ct. 274, 275, 70 L. Ed. 530, Justice Holmes pointed out the nature of the relationship between the government and its soldiers in war risk policies, and recognized that insurance for soldiers was based upon a different relationship. It was not regarded as one of "familiar form." He said: "The insurance was a contract, to be sure, * * * but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them if not paternal was at least avuncular. * * * It was a new experiment. * * *"

Whatever may be the equities in favor of the appellee, and much may be said in its favor, it is clearly established we think that there can be no waiver here by the conduct of the appellant. The law does not permit waiving statutory requirements by the acts of employees of the government. The failure to pay the premiums prior to October 2 resulted in a lapse of the policy which may not now be held to be waived by the conduct of the government's employees.

Judgment reversed.

[fol. 181] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the courtrooms in the Post Office building in the City of New York, on the 12th day of March, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

WILBUR NATIONAL BANK OF ONEONTA, N. Y., as Administrator, etc., Plaintiff-Appellee,

vs.

UNITED STATES, Defendant-Appellant

Appeal from the District Court of the United States for the Northern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 182] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Wilber National Bank of Oneonta, N. Y., vs. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 12, 1934. William Parkin, Clerk.

[fol. 183] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 182, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Wilber National Bank of Oneonta, N. Y., as Administrator, etc., Plaintiff-Appellee, against United States, Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of June, in the year of our Lord one thousand

nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 184] IN THE SUPREME COURT OF THE UNITED STATES

WILBER NATIONAL BANK OF ONEONTA, NEW YORK, Administrator of the Estate of James Patrick Mahar, Deceased, Petitioner,

v.

THE UNITED STATES OF AMERICA

October Term, 1933

ORDER EXTENDING THE TIME FOR DOCKETING THIS CAUSE

Upon consideration of the request of petitioner herein it is this, the 2nd day of June, 1934,

Ordered, That the time for docketing this cause, filing the record, and filing the petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, and supporting brief, be, and the same hereby is extended for a period of 60 days from June 2, 1934.

HARLAN F. STONE,
Associate Justice.

[fol. 185] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed, in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
JUL 21 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 210

THE WILBER NATIONAL BANK OF ONEONTA, NEW YORK, AS ADMINSTRATOR OF THE ESTATE OF JAMES PATRICK MAHAR, DECEASED,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

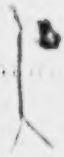
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WILLIAM WOLFF SMITH,
Counsel for Petitioner.

FRANK C. HUNTINGTON, ESQ.,
Of counsel.

U. S. PRINTING CO., WASHINGTON, D. C.



INDEX

	Page
Petition	1
Statement	2-4
Questions presented	4-5
Reasons for Granting Writ	5-7
Brief	8-19
Opinions below	8
Jurisdiction	8
Statement of the case	2-4
Statutes involved	8, 20-23
Specification of Errors	8, 9
Summary of Argument	9
Argument	9-19
Origin of Government Insurance	13
Government Life Insurance	14
Administrative expense	15
Policy-holders and Policies	16-18
Conclusion	18-19
Appendix,	
A—Statutes involved	20-23
B—Insurance Form 882	24, 25
C—Report of Administrator of Veterans' Affairs, 1933	26-28

CASES CITED

Birmingham v. *United States*, 4 Fed. (2d) 508 (CCA 8)	12
Crawford v. *United States*, 40 Fed. (2d) 199 (CCA 2)	12
Jackson v. *United States*, (D.C.) 29 Fed. (2d) 981	13
Lynch v. *United States*, Adv. Ops. October Term 1933—78 L. ed. 997	12
Raives v. *Raives*, 54 Fed. (2d) 267 (CCA 2)	12
Standard Oil Co. of N. J. v. *United States*, 267 U. S. 76, 45 Sup. Ct. Rep. 211, 69 L. ed. 519	5, 7, 9, 12, 13, 14

Page

State Bank and Trust Co. v. *United States*, 16 Fed. (2d) 439 (CCA 6) 10, 11
United States v. *Loveland*, 25 Fed. (2d) 447 (CCA 3) 12
United States v. *Worley*, 281 U. S. 339, 50 Sup. Ct. Rep. 291, 74 L. ed. 887 ..... 5, 13, 14
White v. *United States*, 270 U. S. 175, 46 Sup. Ct. Rep. 274, 70 L. ed. 530 ..... 5, 7, 9, 12, 14

STATUTES

Act of September 2, 1914, 38 Stat. 711 13
Act of October 6, 1917, 40 Stat. 404 14
40 Stat. 409 13
Act of August 9, 1921, 42 Stat. 198 12
Act of March 20, 1933, Title 38 U.S.C. c. 10, §705 12
Title 28 U.S.C. §347 8
Title 38 U.S.C. c 10, §443 ..... 6, 15, 18
Title 38 U.S.C. c. 10, §445 ..... 2, 18
Title 38 U.S.C. Supplement VII c. 10, §511 16
Title 38 U.S.C. Supplement VII c. 10, §511 (b) 16
Title 38 U.S.C. Supplement VII c. 10, §512 16
Title 38 U.S.C. Supplement VII c. 10, §512 (b) 17

OTHER CITATIONS

Annual Report of Administrator of Veterans' Affairs, 1933 17-18
Insurance Form 882, Veterans Administration 15-17
Senate Document 131, 72d Congress 13-14

APPENDIX

A—Title 38 U.S.C. c. 10, §443 22
Title 38 U.S.C. Supplement VII, c. 10, §511 20
Title 38 U.S.C. Supplement VII, c. 10, §512 21
B—Insurance Form 882, Veterans Administration 24
C—Report of Administrator of Veterans' Affairs (Extracts) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. ——

THE WILBER NATIONAL BANK OF ONEONTA, NEW YORK, AS ADMINSTRATOR OF THE ESTATE OF JAMES PATRICK MAHAR, DECEASED,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner, as administrator of the estate of James Patrick Mahar, deceased, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on March 5, 1934 (R. 179), reversing the judgment of the United States District Court for the Northern District of New York,

May 16, 1933, in favor of the plaintiff-petitioner (R. 106). Upon request the time for filing this petition was extended until sixty days from June 2, 1934.

STATEMENT

Your petitioner sued in the District Court under Section 445, c. 10, Title 38, U.S.C., to recover benefits under a policy of Government Life Insurance issued to plaintiff's decedent who had made his estate the beneficiary of his policy. (R. 3-9). Payment had been denied by the Veterans Administration on the ground that the policy had lapsed for non-payment of the premium due September 1, 1927 (R. 91).

Both sides moved for directed verdict (R. 87), the court handed down a written opinion (R. 88-92), and filed its Findings of Fact and Conclusions of Law (R. 92-97).

The "Findings of Fact" by the District Court (R. 93-96), restated in the opinion of the Circuit Court of Appeals, show that James Patrick Mahar enlisted in the military service on or about June 25, 1917, and was honorably discharged on or about April 3, 1919. During his service he contracted with the United States for War Risk yearly renewable term insurance in the amount of $10,000, which lapsed August 31, 1919 for the non-payment of the premium due August 1, 1919 (R. 93).

In June 1927 he applied for the reinstatement of $5,000 of such insurance and its conversion into a policy of Government Life Insurance in the form known as a Five Year Convertible Term Policy (R. 93), and with his application remitted $13.90 to be ap-

plied as premiums (R. 94), receipt of which was acknowledged July 29, 1927 (R. 136-137).

On or about September 19, 1927 the policy was issued to the insured, which policy contained the usual provision that if he became permanently and totally disabled while it was in force payment of premiums would be waived (R. 94) and monthly benefits in the amount of $5.75 per $1,000 of the insurance would be payable while he was permanently and totally disabled (R. 118-134).

In September 1927 Mahar became ill and by October 17, 1927 he had become permanently and totally disabled and remained so until his death on December 24, 1927 (R. 94).

On November 2, 1927 Helen Mahar, on behalf of her husband, remitted $3.95 for a monthly premium as provided in the policy, and a similar remittance was made by her on December 20, 1927 (R. 94).

At no time prior to the death of the insured did the United States give any notice as to the application by it of the original remittance of $13.90 or the two subsequent remittances of $3.95 each, but after his death his widow received from the Veterans' Administration an undated receipt for the sum of $3.95, containing the words: "Tendered in payment of the premium due September 1, 1927." (R. 95). Said receipt (R. 95, 140, 141) also contained the following notation written in ink:

Premiums through January, 1928	$19.75
Received	10.55
Prem. Bal. due	$ 9.20

The $10.55 noted in the above memorandum apparently includes the two remittances of November 2, 1927, and December 20, 1927 (R. 95), and a balance of $2.65 from the original remittance of $13.90.

The court found (R. 95, 96) that "the Government did not until after the death of the said James Patrick Mahar send any notice to Mahar or his family that any premiums were due, or that said policy had lapsed, or that the payment of $13.90 had not been entirely applied to the payment of premiums on the said $5,000 life insurance policy, other than contained in the policy, itself, received on or about September 20, 1927." The court further found: "That the Government in addition to retaining the original $13.90 has retained the said two payments of $3.95 and made no offer during Mahar's lifetime to return said payments." (R. 96).

On the above facts the District Court concluded as a matter of law that plaintiff was entitled to judgment (R. 97), and caused same to be entered (R. 106-108). On appeal the judgment was reversed (R. 180).

Questions Presented

1. Whether, in conducting the Government Life Insurance business as Trustee for the Government Life Insurance Fund, the United States is engaged in the life, total disability, and total and permanent disability insurance business and is obligated to the same rules as to sending out notices, applying premiums and obeying customs, applicable to the commercial insurance companies with which it competes for such business.

2. Whether it is bound by the acts of its agents in the same manner as any other insurer and is estopped to deny payment in this case because of the conduct of its agents.

Reasons for Granting the Writ

This Court has never passed upon the important question of Federal Law involved, and petitioner believes that the Circuit Court of Appeals has decided them contrary to principles enunciated by this Court in *Standard Oil Co. of N. J.* v. *United States,* 267 U. S. 76, 45 Sup. Ct. Rep. 211, 69 L.ed. 519, *White* v. *United States,* 270 U.S. 175, 46 Sup. Ct. Rep. 274, 70 L. ed. 530, and *United States* v. *Worley,* 281 U. S. 339, 50 Sup. Ct. Rep. 291, 74 L. ed. 887,[1] in which *Standard Oil Co.* v. *United States* was distinguished from *White* v. *United States.*

Policies of *War Risk yearly renewable term insurance* are no longer issued but Government Life In-

---

[1] A similar question as to War Risk yearly renewable term insurance was presented to this Court in *United States* v. *Worley,* on certificate from the United States Circuit Court of Appeals for the Eighth Circuit. This Court held as follows:

> "1. Upon the facts stated (in the certificate) does the United States, as a matter of law, stand in the position of one who has gone into the business of insurance, and must, therefore, be assumed to have accepted the ordinary incidents of suits in such business?
>
> "Apparently, this question was suggested by language in our decision in *Standard Oil Co.* v. *United States,* 267 U.S. 76, 79, 69 L. ed. 519, 521, 45 Sup. Ct. Rep. 211. While the answer sought might aid in the determination of the proper application of that opinion, it is not necessary for the decision of the case. The question is one of objectionable generality, *United States* v. *Mayer,* 235 U.S. 55, 66, 59 L. ed. 129, 134, 35 Sup. Ct. Rep. 16. It need not be answered.

The *Worley* case involved a claim for interest on a judgment in a suit upon a contract of *War Risk yearly renewable term insurance,* while this case is concerned with a policy of *Government Life Insurance.*

surance is a going concern, writing new policies in excess of 20,000 per annum amounting to $80,000,000 insurance. For certain business it is in active competition with commercial life insurance companies, namely, insurance against death, total disability and/or total and permanent disability for officers and enlisted men entering upon service in the Army, Navy, Marine Corps and Coast Guard, and women entering upon service in the Army and Navy Nurse Corps; also for veterans of the World War who are insurable risks according to accepted standards.

Policies are written in substantially all usual and familiar forms. Losses, other than those due to the extra hazards of war, are paid from the Government Life Insurance Fund which is derived exclusively from the premiums paid by policy-holders, and from interest on investments in Government securities and loans on policies and adjusted service certificates. Title 38 U.S.C. c. 10, §443, Appendix A, p. 22. This Fund now amounts to approximately $650,000,000, and the annual income amounts to about $25,000,000 from interest on investments and $70,000,000 from premiums. There are about 620,000,000 policy holders with insurance amounting to $2,782,708,503 in force. The Fund is available solely to pay losses, dividends, refunds to policy-holders and judgments. The expense of administering the Fund is borne by the Government but is comparitively insignificant as practically all those so engaged are employed by the Government for other purposes and this work is in addition to their other duties.

It is of great importance to present and future policyholders to know whether they are dealing with the Government in its sovereign capacity and clothed with immunity from responsibility for the acts of its employees, as held by the Circuit Court of Appeals on the strength of *White* v. *United States, supra,* or whether it has waived that immunity and in acting as the Trustee for a Mutual Life Insurance Company it is liable as any other insurer, as found by the District Court following *Standard Oil Co.* v. *United States, supra.* Especially is this the case since claims are being adjudicated by the Veterans Administration to the number of 5,000 annually and the large number of suits on such claims pending in the Federal Courts is increasing.

It would appear that the decision in the case at bar depends upon the answer to the questions presented for it is practically conceded that unless the immunity of the Government extends to the acts of the agents of the Government Life Insurance Fund the insurance claimed in this case should be paid. Petitioner so believes and submits that the judgment of the Circuit Court of Appeals should be reversed.

WILLIAM WOLFF SMITH,
Counsel for Petitioner.

Brief in Support of Petition

Opinions

The opinion of the Court of Appeals is reported in 69 Fed. (2d) 526.

The opinion of the District Court is in the Record, pp. 88-92.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C. §347. Upon request the time for filing this petition was extended until sixty days from June 2, 1934.

Statement of the Case

The facts stated in the foregoing petition (pp. 2-4) are adopted as a part of this brief.

Statutes Involved

The statutes involved are set forth in the Appendix, *infra,* pp. 20-23.

Specification of Errors

The Circuit Court of Appeals erred

1. In holding that in administering the Government Life Insurance Fund the Government is not to be regarded as an ordinary insurance company.

2. In holding that there was no estoppel and the policy lapsed for the non-payment of the premium due September 1, 1927.

3. In holding that the failure to pay premiums prior to October 2, 1927, resulted in a lapse of the policy which may not now be held to be waived by the conduct of the Government's employees.

4. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

A summary of the argument will be found in the petition—"Reasons for Granting the Writ."

ARGUMENT

Thought as to Government Life Insurance is divided into two schools diametrically opposed to each other, and the existing confusion will doubtless persist until the atmosphere is cleared by a decision from this Court.

The first school believes that the Government Life Insurance business approximates the marine insurance business discussed in *Standard Oil Co.* v. *United States,* 267 U.S. 76, 45 Sup. Ct. Rep. 211, 69 L. ed. 519, and the principles there laid down are applicable to suits upon claims against the Government Life Insurance Fund.

The second school maintains that Government Life Insurance is an outgrowth of War Risk yearly renewable term insurance and the applicable principles are those in *White* v. *United States,* 270 U.S. 175, 46 Sup. Ct. Rep. 274, 70 L. ed. 530.

The District Court accepted the *Standard Oil* case as controlling, and in his Conclusions of Law (R. 76) Judge Bryant applied it to this case as follows:

> "2. That the United States went into the insurance business, issued policies in familiar form and

it must be assumed thereby to have accepted the ordinary incidents of suits in such business.

"3. That the United States Government engaged in the life insurance business in competition with private insurance corporations and thereby became obligated to the same rules as to sending notices and applying premiums and obeying customs, applicable to private insurance corporations, and has failed to give notice and keep the insured informed as required by fairness, equity and law.

"4. That by its failure to explain its allocation of moneys paid, failure to give notice respecting future premiums, failure to return premiums and funds for many months after it now claims the policy had lapsed, and general failure to provide necessary information and explanation to the insured, the defendant has estopped itself from withholding payment because of the alleged lapse."

In *State Bank and Trust Co.* v. *United States,* 16 Fed. (2d) 439, cited by Judge Bryant, the United States Circuit Court of Appeals for the Sixth Circuit said: "We are inclined to approach the controversy as we would any other between insurer and insured." This was an action to compel the Veterans' Bureau to continue payments of insurance to the guardian of an illegitimate child of the insured soldier, who had taken out the insurance for the benefit of plaintiff's ward and who had acknowledged its paternity in his will. Applying well recognized principles of insurance law the court found for the plaintiff and awarded costs on the theory that the Veterans' Bureau "has a fund from which not only the principal sum but, in cases like this, the costs can be properly paid." The court may

have had in mind the Government Life Insurance Fund, which, it would seem, is available for the payment of costs if so provided in the judgment. In the *State Bank and Trust Co.* case, however, the claim was on a policy of War Risk yearly renewable term insurance. This Court denied certiorari April 18, 1927.

The views of the second school of thought are summarized in the following extracts from the opinion of the United States Circuit Court of Appeals for the Second Circuit, Manton, C.J., (R. 179-180):

> "It is the appellee's contention that the United States Government is bound by the acts of its agents in the same manner as any other insurer and that by electing to receive the premium for September it waived any right it might have had to insist upon a cancellation of the policy for failure to pay the premium due September 1st; that it thereby made the policy in full force during September and October. * * The claim that there was such a waiver cannot be sustained. * * * The United States is bound by its agents only to the extent that it consents to be so obligated. * * * The Government is not regarded as an ordinary insurance Company. An agent of the United States has no power to place liability upon it by an act of omission which he could not do by commission. This is so firmly settled as to forbid holding that when the Government entered a new field, it broadened the powers of employees to bind the Government where they had no such power in other fields. Therefore, there was no estoppel and the policy lapsed by non-payment."

The Court in its opinion cited *Crawford* v. *United States,* (CCA 2) 40 Fed. (2d) 199, *Raives* v. *Raives,* (CCA 2) 54 Fed. (2d) 267, *Birmingham* v. *United States,* (CCA 8) 4 Fed. (2d) 508, and *United States* v. *Loveland,* (CCA 3) 25 Fed. (2d) 447, but rested upon *White* v. *United States, supra,* as distinguished from *Standard Oil Co.* v. *United States, supra.*

Of the cases cited the only one which involved a Government Life Insurance policy was *Crawford* v. *United States,* in which Judge Manton also wrote the opinion. In the *Crawford* case the expression is employed: "*Appellant* is held only to the extent that *it* expressly consents to be held on *its insurance risk.*" (Italics supplied.) But the United States has no *insurance risk* in connection with Government Life Insurance except that incident to the hazards of war, not involved in either this case or the *Crawford* case. It is also thought probable that the expression of the opinion of the court as to §2 of the Act of August 9, 1921, 42. Stat. 198, would be modified by the views of this Court as to §5 of the Economy Act, Title 38 U.S.C. §705, set out in the opinion in *Lynch* v. *United States,* Adv. Ops. Oct. Term 1933-78 L. ed. 997-1005. There is no question in the case at bar as to the validity of the policy which was the issue in the *Crawford* Case.

In *Raives* v. *Raives* the question involved was fraud in connection with the reinstatement of a policy of *War Risk yearly renewable term insurance,* and in *Birmingham* v. *United States* the issue was whether the acceptance of premiums after the death of the insured validated a policy of *War Risk yearly renewable term insurance. United States* v. *Loveland* involved ques-

tions relating solely to *War Risk yearly renewable term insurance.*

Petitioner believes that in the instant case the Circuit Court of Appeals failed to recognize the character and incidents of the Government Life Insurance Fund and to appreciate the conditions under which it is being administered by employees of the Government.

Origin of Government Insurance

The Bureau of War Risk Insurance was established by the Act of September 2, 1914 (c. 293, §5, 38 Stat. L. 711, 9 Fed. Stat. Anno, 2d. ed. p. 1302) within a few days after Europe went to war, to enable American owners of vessels and cargoes to obtain from the Government insurance which could not be had from private companies except at prohibitive rates threatening the extinction of American commerce and shipping. *Jackson* v. *United States,* (D. C.) 29 Fed. (2d) 981, *Standard Oil Co.* v. *United States, supra.*

April 6, 1917 the United States entered the World War and October 6, 1917 the Act of September 2, 1914 was amended to provide policies of insurance for soldiers, sailors and marines in the military and naval service. 40 Stat. 409. The reasons which actuated Congress are stated in Senate Document No. 131, 72d. Congress, 1st Session, "Federal Laws relating to Veterans of Wars of the United States, annotated," Chapter IX—Insurance, p. 253. They are discussed in *United States* v. *Worley,* 281 U. S. 339, 50 Sup. Ct. Rep. 291, 74 L. ed. 887.

This insurance was not issued "in familiar forms." On the contrary only one form was provided by law,

namely "That during the war and thereafter until converted the insurance shall be *term insurance for successive terms of one year each.*" §404, Act of October 6, 1917. (Italics supplied.)

The distinction is developed in *White* v. *United States, supra,* the opinion having been written by Mr. Justice Holmes who wrote the opinion in *Standard Oil Co.* v. *United States, supra.* It is interesting to note that while the Government lost money on the yearly renewable term insurance it made millions out of Marine insurance. *United States* v. *Worley, supra.*

Government Life Insurance

Government Life Insurance, however, is an undertaking distinctly different from either the marine insurance or the yearly renewable term insurance. By §404 of the Act of October 6, 1917, it was provided that not later than 5 years after the termination of the war "the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be provided by regulations and as the insured may request." The time for conversion was later extended to July 2, 1927. (*Appendix A,* p. 21.)

A description of the forms of policies of Government Life Insurance, premiums, conditions for reinstatement or conversion to higher or lower forms, paid up insurance, cash surrender value, extended insurance, etc., is found in Senate Document 131, *supra,* pp. 253-263. Attention is especially invited to ¶4, p. 255, which reads in part as follows:

> "The premiums paid by holders of converted insurance policies are deposited into the Treasury to

the credit of the United States Government Life Insurance Fund. The Government acts in the capacity of trustee of the fund, administering the payment of all claims thereunder and the investment and reinvestment of the fund in interest bearing obligations of the United States or bonds of the Federal loan banks."

See also, Title 38 U.S.C. c. 10, §443, *Appendix A*, p. 22.

Government Life Insurance is described in Insurance Form 882, Veterans Administration, just issued, (*Appendix B*, p. 24), as follows:

"United States Government Life Insurance is essentially mutual insurance, the Government acting only as a trustee. Premiums and all other income are deposited in a separate trust fund, designated as the United States Government Life Insurance Fund, which is administered by the Government for the sole benefit of the policyholders. • • •

"The Government bears all of the expense incident to administration, as well as all losses traceable to the extra hazards of the military and naval service."

Administrative Expense

A certain amount of machinery is necessary to segregate the losses due to "the extra hazards of the military and naval service," (the wording of the statute is "hazards of war,"), and as the Veterans' Administration maintains agencies in all States for hospitalization and examination of claimants for benefits of all kinds, and for the adjudication of claims for pension, compensation, civil service pension and yearly renewable term

insurance, etc., the additional cost of administering the Government Life Insurance Fund is a mere trifle.

While those administering the Fund are employees of the Government they are actually employed to perform other and strictly governmental duties. Their insurance activities are in addition to their other work and in performing them they are acting as agents for a Mutual Life Insurance Company competing for business with other insurance companies and issuing the same form of policies.

Policy-Holders and Policies

The benefits of Government Life Insurance are not confined to veterans of the World War. Officers and enlisted men of the Army, Navy, Marine Corps and Coast Guard, and members of the Army Nurse Corps, female, and Navy Nurse Corps, female, are entitled to take out such policies without medical examination if they apply within 120 days after they enter the service. Title 38 U. S. C. Supplement VII, c. 10, §511. (*Appendix A,* p. 20). Veterans of the World War are entitled to take out such insurance if they are insurable risks. Title 38 U.S.C. c 10 §511 (b).

Policies are written in the usual forms including ordinary life, five-year level premium term, 20 payment life, 30 payment life, 20 year endowment, 30 year endowment, endowment maturing at the age of 62, etc. Premiums are based upon the American Experience Table of Mortality and interest at 3½% per annum. Title 38 U.S.C. Supplement VII c. 10, §512. *Appendix A,* p. 21. The return from investments, however, is considerably higher than 3½%.

All policies provide for total and permanent disability benefits, to meet which a contingent reserve has been established by diverting surplus income from investments and reducing the dividends otherwise payable. Administrator's Report 1933, p. 26. *Appendix C*, p. 26. In some cases dividends have been discontinued to cover this liability. Insurance Form 882, Veterans Administration, *Appendix B*, pp. 24-25.

If the insured so desires a *total disability* provision is included in the policy under which benefits are payable after the fourth month and during the continuance of the total disability. This benefit is distinct from the *total and permanent disability* benefit, and total disability benefits may be paid separately or in addition to payments of total and permanent disability benefits. An additional premium is charged for the total disability protection. Title 38 U.S.C. Supplement VII c. 10, §512 b.

The report of the Administrator of Veterans' Affairs for 1933, states that during the fiscal year of 1933 1,924 policies were reinstated, carrying insurance of $10,382,-448, and 20,917 applications (*new business*) were approved aggregating $80,565,934, as compared with 19,412 applications, (*new business*), amounting to $77,178,650 approved during the fiscal year of 1932. The total number of policies in force on June 30, 1933 was 616,069, amounting to $2,782,708,583 insurance. The report further shows (p. 27) that $677,553,878.14 has been paid into the fund by policy-holders, and at the end of the calendar year of 1932 there was a balance on hand of $609,523,765.03 invested in Farm Loan

bonds, loans on Government Life Insurance policies and adjusted service certificates, and $2,073,433.97 cash. Other "non-ledger assets" brought the total resources of the Fund up to $632,230,892.62 (Report, p. 72). The annual income from invested funds is approximately $25,000,000, and from premiums about $70,000,000.

Additional data from this report will be found in the *Appendix C*, pp. 26-28.

CONCLUSION

It is true that this suit was brought against the United States by its consent (Title 38 U.S.C. c. 10, §445) but the United States is not being sued in its sovereign capacity, but rather as Trustee for the Government Life Insurance Fund, for if plaintiff finally prevails payment will be made wholly from the Fund and the United States will pay nothing. Title 38 U.S.C. c. 10, §443, *Appendix A*, p. 22.

We believe the facts and the law amply sustain the opinion of the District Court that "under the facts in this case, it would be unconscionable to allow a private company to avoid its obligation on the ground of delayed premiums. The same principle should be applied against the defendant in this case. * * * Having elected to become an insurer and to cast aside its immunity from suit, the Government must have its liabilities or rights as an insurer determined by the same rules as any other insurer and by the same course of reasoning as is applied by the court in reaching a decision in a like case between private parties." (R. 91).

It is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed, and the judgment of the District Court should be affirmed.

WILLIAM WOLFF SMITH,
1528-18th Street N.W.,
Washington, D. C.
Counsel for Petitioner.

Frank C. Huntington, Esq.,
241 Main Street,
Oneonta, New York.
Of counsel.

APPENDIX A

STATUTES

TITLE 38 U.S.C. SUPPLEMENT VII

Part III

Insurance

Sec. 511. Persons entitled to; amounts; time for application for; to whom payable; expense of; premium rates.—In order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department protection for themselves and their dependents, the United States, upon application to the bureau and without medical examination, shall grant United States Government life insurance (converted insurance) against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided. Such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation: *Provided,* That any member of the reserve forces whose application was accepted at a time when he was in attendance at a military or naval training camp or station, and from whom premiums were collected, and who becomes or has become totally or (*and?*) permanently disabled, or dies or has died, shall be deemed to have made valid

application therefor. This proviso shall not authorize the granting of more than $10,000 insurance to any one person: *Provided further,* That each officer and enlisted man of the Coast Guard who is serving on active duty on July 2, 1926, or who subsequent thereto enters the Coast Guard Service, shall be granted insurance in accordance with the terms of this section upon application within one hundred and twenty days after July 2, 1926, or date of enlistment or entry into the Coast Guard, whichever is the later date, and before retirement, discharge, or resignation.

* * * * * *

The United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at 3½ per centum per annum. This section shall be deemed to be in effect as of June 7, 1924. (As amended July 2, 1926, c. 723, §14, 44 Stat. 798; May 29, 1928, c. 875, §13, 45 Stat. 967.)

Sec. 512. Term insurance; when terminated; conversion to elected policies; payment.—Except as provided in the second paragraph of this section, nor later than July 2, 1927, all term yearly renewable insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium

term, and into other usual forms of insurance, and for reconversion of any such policies to a higher premium rate or, upon proof of good health satisfactory to the director, to a lower premium rate, in accordance with regulations to be issued by the director, and shall prescribe the time and method of payment of the premiums thereon, but payment of premiums in advance shall not be required for periods of more than one month each, and may be deducted from the pay or deposit of the insured or be otherwise made at his election: *Provided,* That no reconversion shall be made to the five-year level premium form or policy * * *

38 U.S.C. Ch. 10, §443:—United States Government Life Insurance Fund; premiums paid on account of converted insurance credited to; payments from; reserve funds.—All premiums paid on account of insurance converted under the provisions of Title III hereof shall be deposited and converted into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance, including such liabilities as shall have been or shall hereafter be reduced to judgment in a district court of the United States or in the Supreme Court of the District of Columbia. Payments from this fund shall be made upon and in accordance with awards by the director. The bureau is authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby

authorized to invest and reinvest the said United States Government life insurance fund, or any part thereof, in interest-bearing obligations of the United States or bonds of the Federal farm-loan banks and to sell said obligations of the United States or the bonds of the Federal farm-loan banks for the purposes of such fund. Act of June 7, 1924, c. 320, s. 18, 43 Stat. 612.

APPENDIX B

Insurance Form 882.

VETERANS ADMINISTRATION

WASHINGTON

Dear Sir:

A new schedule of dividends payable on United States Government life insurance policies has been adopted, effective January 1, 1934. This schedule is based on the results of an extensive study, by competent and disinterested consulting actuaries, of the experience under this insurance over a period of years, and equitably reflects the sources from which gains and savings are derived.

United States Government life insurance is essentially mutual insurance, the Government acting only as a trustee. Premiums and all other income are deposited in a separate trust fund, designated as the United States Government Life Insurance Fund, which is administered by the Government for the sole benefit of the policyholders. The premiums charged are the net rates in accordance with the American Experience Table of Mortality on a 3½% reserve basis, and include no charge for total permanent disability protection. The Government bears all of the expense incident to administration, as well as all losses traceable to the extra hazards of the military and naval service.

Dividends on United States Government life insurance represent a return to the insured from the excess of the premiums paid over and above the actual cost of the insurance protection. Under the schedule of dividends, those policies on which the premiums and earnings to date have been adequate

to build up the reserves required on account of both the death and disability benefits provided in the policy, will receive a dividend representing their equitable share of the amount of the surplus, gains and savings to be distributed. Those policies which have not yet accumulated the necessary reserves will not become entitled to dividends unless and until the reserves required have been accumulated.

The accumulations credited to the group which includes your above-numbered policy are not sufficient to provide the required reserves, and, consequently, it is regretted that it is necessary to advise you that no dividend is payable on this policy.

Respectfully,
H. L. McCoy,
Director of Insurance.

APPENDIX C

FROM THE ANNUAL REPORT OF THE ADMINISTRATER OF VETERANS' AFFAIRS FOR 1933.

P. 25. INSURANCE—At the close of this fiscal year there were 616,069 Government life (converted) insurance policies in force aggregating $2,782,708,583 of insurance as compared with 641,218 policies in force, aggregating $2,977,083,467 of insurance at the close of the preceding year. This decrease is directly due to the difficulties experienced by many policyholders confronted with the adverse conditions resulting from the prolonged economic depression. While the number of new policies totalling 20,917 issued during this fiscal year exceeded the 19,412 new policies issued during the fiscal year 1932, the number of policies lapsed and surrendered for cash greatly exceeded the number fiscal year. During this fiscal year 15,178 policies were of policies terminated for these causes in the preceding surrendered for cash, an increase of 76% over the 8,597 policies surrendered for cash in the fiscal year 1932. Correspondingly 40,057 policies were lapsed, an increase of 96% over the 20,456 policies lapsed during the fiscal year 1932. In this connection it is appropriate to note that 123,530 policy loans were granted as compared with 105,058 in 1932 and 80,046 in 1931.

A new schedule was adopted for dividends payable during the calendar year 1933 providing for a reduction in dividends on all level premium life and endowment policies. There has been reserved for this purpose in 1933, $3,650,000, a decrease of approximately 50%

in the amount of dividends paid in 1932. No dividends were authorized for payment on the 5-year term policies for the reason that the higher rate of death and disability under this type does not justify the return of a cash dividend.

The surplus earnings of the United States Government life insurance fund for this year were less than those of the preceeding year due to the relatively large payments for death claims and disability benefits and the lower interest yield from the funds loaned on the security of adjusted service certificates, on which the interest rate was reduced by law. In the interest of sound administration it was, therefore, decided to reduce the dividend for 1933 to a more conservative scale in order to add a larger proportion of the so-called surplus earnings, otherwise distributable as dividends, to the contingency reserve, which has been built up to provide for future disability payments, thus strengthening the financial structure for the greater protection of all policyholders.

The premium charged for Government life insurance is the net rate based on the American Experience Table of Mortality with interest at 3½% per annum, compounded annually. There is no loading for expenses added to the net premium since the Government pays all cost of administration. In addition to the death benefit, a liberal total permanent disability benefit without limit as to the age before such disability must occur, is included in each Government policy for which no extra premium is charged. It has, therefore, been necessary to make provision for the liability incurred on account of this disability benefit out of the surplus earnings of

the United States Government life-insurance fund. A very substantial contingency reserve has already been built up, and a study is now being made to determine the amount of the reserve required to meet the disability losses in future years. When this evaluation of the Government life-insurance fund has been completed a definite policy for future dividend distribution will be adopted.

* * * * * *

Premium income—United States Government life-insurance premiums are deposited to the credit of the United States Government life-insurance fund from which are paid claims on account of total permanent disability and death, dividends, and refunds. During the fiscal year ending June 30, 1933, premiums amounting to $67,961,784.36 were received on United States Government life-insurance policies. The amount of United States Government life-insurance premiums to date totals $677,553,878.14.

INDEX

		PAGE
Opinions		1
Jurisdiction		2
Statement of Case		2
Statutes Involved		2
Regulations		17, 18
Specification of Errors		2, 3
Summary of Argument		3-6
Argument		6-31
Point I.	The Government is engaged in Life and Disability Insurance Business in competition with commercial companies	6
	Hence: As to sending out notices, applying premiums, and obeying customs, the Government, in operating the Government Life Insurance Fund is obligated to the same rules as its competitors	8
Point II.	The Government is subect to estoppel and in dealing with holders of Government Life Insurance policies it may be bound by the acts of its agents	11
Point III.	Upon a given state of facts its liability is the same as that of any other insurer	16
	Hence it is estopped to deny payment of insurance in this case because of the conduct of its agents	16
Point IV.	Interest should be allowed	29
Conclusion		31

CASES CITED

PAGE

Brooklyn Life Insurance Co. v. *Miller,* 12 Wall. 285, 20 L. ed. 398 25

Christie v. *United States,* 237 U.S. 234, 59 L. ed. 933, 34 Sup. Ct. Rep. 565 14

Cooke et al. v. *United States,* 91 U.S. 389, 23 L. ed. 237 ..... 4, 9, 10, 11, 14, 16

Doris v. *Gray,* 16 Wall. 203, 21 L. ed. 447 11

Duval v. *United States,* 25 Ct. Cl. 60 11

England National Bank v. *United States,* 282 Fed. 121 (CCA8th) 15

Garrison v. *United States,* 7 Wall. 688, 690 10

Gibbons v. *United States,* 8 Wall. 269 14

Hartford Life and Annuity Insurance Co. v. *Unsell,* 144 U.S. 439, 36 L. ed. 496 ..... 5, 27

Hollerback v. *United States,* 223 U.S. 165, 58 L. ed. 898 ..... 10, 14

Hartson v. *United States,* 21 Ct. Cl. 456 11

Jackson v. *United States,* 281 U.S. 334, 345, 74 L. ed. 891 ..... 29, 30

Lindsey v. *Hawes,* 2 Black. 560, 17 L. ed. 265 11

Loveland v. *United States,* 18 Fed. (2d) 585, 25 Fed. (2d) 447 (CCA3d); *certiorari* granted June 4, 1928, 72 L. ed. 686; error confessed Jan. 14, 1929, 73 L. ed. 571 9

Lynch v. *United States,* 292 U.S. 571, 78 L. ed. 997 10

McArthur v. *United States,* 258 U.S. 6, 42 Sup. Ct. Rep. 225, 66 L. ed. 433, 436 ..... 4, 13

McMaster v. *New York Life Insurance Co.,* 183 U.S. 25, 46 L. ed. 64, 74 ..... 6, 21, 22, 30

PAGE

Mutual Life Insurance Co. v. *Hurni,* 263 U.S. 167, 44 Sup. Ct. Rep. 90, 68 L. ed. 235, 239 ..... 9, 17

New York Life Insurance Co. v. *Dumler,* 282 Fed. 969 (CCA 5th) 25

New York Life Insurance Co. v. *Eggelson,* 96 U.S. 572, 24 L. ed. 841, 842 ..... 5, 9, 26

Phoenix Mutual Life Insurance Co. v. *Doster,* 106 U.S. 30, 27 L. ed. 65 ..... 5, 9, 25

Reading Steel Casting Co. v. *United States,* 268 U.S. 186, 188 10

Ritter v. *United States,* 28 Fed. (2d) 265 ..... 4, 16

Sinking Fund Cases, 99 U.S. 710, 25 L. ed. 496 11

Smoot's Case, 15 Wall. 36, 47 10

State Bank and Trust Co. v. *United States,* 16 Fed. (2d) 439 (CCA6) *certiorari* denied, 74 L. ed. 1317 9

Standard Oil Co. of N. J. v. *United States,* 267 U.S. 76, 45 Sup. Ct. Rep. 211, 69 L. ed. 519 ..... 3, 6, 9, 15, 30

The Falcon, 19 Fed. (2d) 1009 14

The Floyd Acceptances, 7 Wall. 688, 690 10

United States v. *Atlantic Dredging Co.,* 253 U.S. 1, 64 L. ed. 735, 40 Sup. Ct. Rep. 59 14

United States v. *Bank of Metropolis,* 15 Pet. 392, 10 L. ed. 774 ..... 10, 11

United States v. *Barker,* 12 Wheat. 559, 6 L. ed. 728 11

United States v. *Flint,* 25 Fed. Cas. 1117 16

United States v. *Kilpatrick,* 9 Wheat. 735 14

PAGE

United States v. *National Exchange Bank,* 270 U.S. 527, 534 10

United States v. *Smith,* 94 U.S. 214, 217 10

United States v. *Smith,* 256 U.S. 11, 65 L. ed. 808, 41 Sup. Ct. Rep. 413 14

United States v. *Spearin,* 248 U.S. 132, 63 L. ed. 166, 39 Sup. Ct. Rep. 59 14

United States v. *Warren Transportation Co.,* 7 Fed. (2d) 161 ..... 9, 13

United States v. *Worley,* 281 U.S. 339, 50 Sup. Ct. Rep. 291, 74 L. ed. 887 ..... 29, 30

Vermilye v. *Adams Express Co.,* 21 Wall. 138, 144 10

Viele v. *Germania Ins. Co.,* 26 Ia. 9, 96 Am. Dec. 83 23

Walker v. *United States* (C.C., M.D. Ala.), 139 Fed. 409 ..... 4, 11, 12, 16

Wilkinson v. *United States,* 37 Fed. (2d) 918 (D.C., W.D.S.C.) 30

Wilner v. *United States,* 292 U.S. 571, 78 L. ed. 997 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 210

THE WILBER NATIONAL BANK OF ONEONTA, NEW YORK, AS ADMINISTRATOR OF THE ESTATE OF JAMES PATRICK MAHAR, DECEASED,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

OPINIONS

The opinion of the Circuit Court of Appeals is reported in 69 Fed. (2d) 526, and appears in the Record, pp. 174-182.

The opinion of the District Court is in the Record, pp. 88-92.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U.S.C. §347. Certiorari was granted October 8, 1934, on a petition filed July 21, 1934. (Time extended June 2, 1934.)

STATEMENT OF THE CASE

The facts were stated in the petition for certiorari, pp. 2-4, and are found in the "Findings of Fact," by the District Court (R. 93-96) which are adopted as a part of this brief.* They are discussed in the argument *infra* pp. 16-31.

STATUTES INVOLVED

The statutes involved are set forth in the appendix to the brief in support of the petition (pp. 20-23) and in the brief of the respondent in opposition thereto (pp. 13-21). A correct statement of Regulations 14 and 15 (Respondent's opposition brief, pp. 19-21), will be found in this brief, in the argument *infra* pp. 17, 18.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that in administering the Government Life Insurance Fund the Government is not to be regarded as an ordinary insurance company.

* This estate, which consists solely of the insurance in question, has been sadly depleted by the expense of litigation in three courts, and to save as much as possible for the widow and children of the veteran it is sought to avoid reprinting the facts and arguments advanced in the petition for writ of certiorari by making proper reference thereto and adopting same as part of this brief, and confining this brief to new matter. Counsel pray the indulgence of the Court.

2. In holding that there was no estoppel and the policy lapsed for the non-payment of the premium due September 1, 1927.

3. In holding that the failure to pay premiums prior to October 2, 1927, resulted in a lapse of the policy which may not now be held to be waived by the conduct of the Government's employees.

SUMMARY OF ARGUMENT

I

The Government is engaged in Life and Disability Insurance business in competition with commercial insurance companies.

Policies are written in all usual and familiar forms of life, total disability, and total and permanent disability insurance. *Standard Oil Co. of N. J.* v. *United States,* 267, U. S. 76, 45 Sup. Ct. Rep. 211, 69 L. ed. 519.

Losses other than those due to the extra hazards of war or of military and naval service in time of peace, are paid from the Government Life Insurance Fund which is derived exclusively from the premiums paid by policyholders, from interest on investments of the Fund in Government securities and loans on policies and adjusted service certificates, and dividends withheld from policy holders. The point is fully covered in the brief accompanying the application for writ of certiorari (pp. 9-18) to which reference is respectfully made.

HENCE: AS TO SENDING OUT NOTICES, APPLYING PREMIUMS, AND OBEYING CUSTOMS THE GOVERNMENT IN OPERATING THE GOVERNMENT LIFE INSURANCE FUND IS OBLIGATED TO THE SAME RULES

AS ITS COMPETITORS. Opinion of Judge Bryant, R. 96.

II

The Government is subject to estoppel and in dealing with holders of Government Life Insurance Policies it may be bound by the acts of its agents.

This principle is well established. The acts or omissions of its officers if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the Government. *Walker* v. *United States* (C.C., M.D. Ala.) 139 Fed. 409; *Ritter* v. *United States*, 28 Fed. (2d) 265.

There is no contention that the acts or omissions of the officers of the Government concerned with the transactions in the instant case were not within the scope of their authority. That the Government may be estopped was decided by this Court in *Jay Cooke et al.* v. *United States*, 91 U.S. 389, 23 L. ed. 237. See also *McArthur* v. *United States*, 258 U.S. 6, 42 Sup. Ct. Rep. 225, 66 L. ed. 433, 436, and other cases cited *infra.*

III

Upon a given state of facts its liability is the same as that of any other insurer.

HENCE IT IS ESTOPPED TO DENY PAYMENT OF INSURANCE IN THIS CASE BECAUSE OF THE CONDUCT OF ITS AGENTS.

July 1, 1927, Mahar, the insured, and a veteran of the World War, duly submitted his application for the reinstatement of his war risk yearly renewable term in-

surance, with a remittance of $13.90 to be applied to premiums. The Veterans Bureau disregarded his allocation of the amount remitted but approved his application, and in September, 1927, issued a Government Life Insurance Policy of the Five Year Convertible Term type. Later it received two additional premiums of $3.95 each. All of the remittances were retained and no attempt was made to return them during the life of the insured. *Phoenix Mutual Life Insurance Co.* v. *Doster*, 106 U.S. 30, 27 L. ed. 65.

In January, 1928, after Mahar's death on December 24, 1927, and nearly four months after the policy was issued, the Bureau for the first time advised him that his insurance had lapsed August 31, 1927 for the non-payment of the premium due September 1, 1927 (R. 140). No attempt was made during his lifetime to so inform him, or to return the excess premiums, and it was not until March 21, 1928 (R. 145), that those interested were advised of the disposition of the remittance of $13.90 made by Mahar July 1, 1927. The record shows that by its own account the Bureau had on hand on September 1, 1927, $2.65 to apply to the September premium. It issued the policy in September but failed to inform the insured that the premium for that month was short by $1.30 or any other amount. The insurance matured by reason of the total and permanent disability of the insured on October 17, 1927 (R. 94), and the respondent acting for the Government Life Insurance Fund is estopped to deny that the insurance was in force on said date. *New York Life Insurance Co.* v. *Eggleston*, 96 U.S. 572, 24 L. ed. 841, 842; *Hartford Life and Annuity Insurance Co.* v. *Unsell*, 144 U.S. 439, 36 L. ed. 496, and other cases cited *infra*.

INTEREST SHOULD BE ALLOWED

IV

Interest was sought from December 24, 1927, as well as costs, but they were not allowed by the judgment. The Government Life Insurance Fund has profited by interest on the $5,000 due on this policy for nearly seven years. Equity and justice require that the Fund shall be liable for this interest to the estate of the insured. *Standard Oil of N. J.* v. *United States, supra.* It should also be liable for costs. *McMaster* v. *New York Life Ins. Co.,* 183 U. S. 25, 46 L. ed. 64, 74.

ARGUMENT

I

THE GOVERNMENT IS ENGAGED IN LIFE AND DISABILITY INSURANCE BUSINESS IN COMPETITION WITH COMMERCIAL INSURANCE COMPANIES.

This point is fully covered in the brief accompanying the petition for writ of certiorari (pp. 9-18) and the argument therein presented is adopted and reaffirmed. Data for the fiscal year ended June 30, 1933, is there presented, and the report of the Administrator of Veterans Affairs for the fiscal year ended June 30, 1934, is not yet compiled. Such statistics as are available show no change in the picture presented in the petition.

In the argument in the brief in opposition to certiorari respondent extolled the generosity of the Government in relieving the Government Life Insurance Fund of the burden of insurance benefits payment of which may be ascribed to the the "hazards of war" or "traceable to the extra hazards of the military or naval serv-

ice," depending upon which section of the Act is under consideration. But this is no favor to the policy holders, but only justice, for it would be exceedingly unjust to load upon them the liabilities of the poor risks due to war service or the extra hazards of the military and naval service in time of peace. Not only has the Government retained all of the premiums paid prior to the conversion of the policies but when the Government assumes the liability because of extra hazards it also takes over all the reserves on such policies. On the other hand if the insured became a poor risk while his term policy was in force and not due to the extra hazards, and soon after the conversion of his insurance became totally and permanently disabled or died, the Government keeps all the premiums on the term insurance and the Government Life Insurance Fund pays the insurance benefits.

It is admitted that the Government is at some expense looking after the extra hazard risks and separating the premiums and payments, but those risks are due to employment in its service and it is merely caring for its own obligations. As for the remainder of the administrative expense connected with the Government Life Insurance Fund petitioner understands it is immaterial. The policies are solicited and written by Government employees in connection with their other duties. The physicians who examine the applicants for insurance or for insurance benefits are the same physicians who examine claimants for pensions, compensation and term insurance benefits, staff the hospitals and soldiers' homes, and give out-patient treatment. The lawyers and rating experts who decide upon the claims either originally or on appeal, are engaged for

far the greater part of their time on other claims. It is doubtful if out of the 35,000 or more employees of the Veterans Administration as many as 100 are exclusively engaged upon work connected with the Government Life Insurance Fund at an annual expense of $250,000 out of a total appropriation for administrative purposes of $89,760,000. Comparatively speaking the additional expense is certainly trivial.

In this connection attention is invited to the following extract from a Press News Release by the Veterans Administration for February 16, 1934:

> "General Frank T. Hines, Administrator of the Veterans Administration, announced today that he has just received from ..... and ....., of New York City, internationally known consulting actuaries, a report on the condition of the United States Government Life Insurance Fund, together with accompanying recommendations, upon which will be based future policy in regard to the maintenance of reserves, the payment of dividends, and other kindred matters. The study of the condition of the United States Government Life Insurance Fund was ordered some time ago by General Hines *so as to assure that the affairs of the Fund were being conducted in accordance with established and accepted insurance practice* * * * United States Government Life Insurance is of the character of mutual insurance, the income being maintained in a trust account separate from other moneys in the Treasury and not commingled therewith. The Fund is administered by the United States for the benefit solely of the policy holders, and the Government enjoys no benefits whatsoever." (Italics supplied.)

HENCE: AS TO SENDING OUT NOTICES, APPLYING PREMIUMS, AND OBEYING

CUSTOMS, THE GOVERNMENT IN OPERATING THE GOVERNMENT LIFE INSURANCE FUND IS OBLIGATED TO THE SAME RULES AS ITS COMPETITORS.

Opinion of Judge Bryant, R. 96.

Standard Oil Co. of N. J. v. *United States*, 267 U.S. 76, 45 Sup. Ct. Rep. 211, 69 L. ed. 519.

State Bank and Trust Co. v. *United States*, 16 Fed. (2d) 439 (CCA 6), certiorari denied April 18, 1927.

Loveland v. *United States*, 18 Fed. (2d) 585, 25 Fed. (2d) 447, (CCA 3d); certiorari granted June 4, 1928, 72 L. ed. 686; error confessed, January 14, 1929, 73 L. ed. 571.

Phoenix Mutual Life Insurance Co. v. *Doster*, 106 U.S. 30, 27 L. ed. 65.

N. Y. Life Insurance Co. v. *Eggleston*, 96 U.S. 572, 24 L. ed. 841-842.

Mutual Life Ins. Co. v. *Hurni*, 263 U.S. 167, 44 Sup. Ct. Rep. 90, 68 L. ed. 235, 239.

In *United States* v. *Warren Transportation* Co., 7 Fed. (2d) 161, the court, in referring to the U. S. Shipping Board Emergency Fleet Corporation said:

> "In executing this contract the corporation through its agents was entering upon a purely commercial transaction. It was not by that act exercising any governmental function; it was exercising what some courts have called 'business powers of the United States'."

In the argument of the famous case of *Jay Cooke et al.* v. *United States*, before this Court, Messrs. Edwards Pierrepont, the Attorney General, and S. F. Phillips, the Solicitor General of the United States, appearing

for the defendant said, "We admit that when the United States engages in commercial business it does so in general submission to the principles of law which, in such business, apply to private persons."

Commenting upon this phase of the case this Court, through Chief Justice Waite, said:

> "It was conceded in the argument that when the United States became parties to commercial paper they incur all the responsibilities of private persons under the same circumstances. *This is in accordance with the decisions of this court.*" (Italics ours.) *Jay Cooke et al.* v. *United States*, 91 U.S. 389, 23 L. ed. 237.

The latest expression of the views of this Court is found in *Lynch* v. *United States*, and *Wilner* v. *United States*, decided June 4, 1934, 292 U. S. 571, 78 L. ed. 997. Speaking through Mr. Justice Brandeis the Court said:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[6]
>
> [6] Compare *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 392; *The Floyd Acceptances*, 7 Wall. 666, 675; *Garrison* v. *United States*, 7 Wall. 688, 690; *Smoot's Case*, 15 Wall. 36, 47; *Vermilye* v. *Adams Express Co.*, 21 Wall. 138, 144; *Cooke* v. *United States*, 91 U. S. 389, 396; *United States* v. *Smith*, 94 U. S. 214, 217; *Hollerbach* v. *United States*, 233 U. S. 165, 171; *Reading Steel Casting Co.* v. *United States*, 268 U. S. 186, 188; *United States* v. *National Exchange Bank*, 270 U. S. 527, 534.

II

THE GOVERNMENT IS SUBJECT TO ESTOPPEL AND IN DEALING WITH HOLDERS OF GOVERNMENT LIFE INSURANCE POLICIES IT MAY BE BOUND BY THE ACTS OF ITS AGENTS.

This principle of insurance law is too well established to require extended discussion, and the same may well be said of the doctrine of estoppel to the Government under certain circumstances. A few citations, however, may be helpful in crystallizing thought on this point.

In the case of *Walker* v. *United States* (C.C., M.D. Ala.) 139 Fed. 409, Walker, a former U. S. Marshal had brought suit to recover certain disallowed claims for mileage fees and expenses. The United States interposed the statute of limitations and later set up a counter-claim, contending the statute of limitations did not run against it.

In its opinion the court said:

> "The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the Government. *Lindsey* v. *Hawes*, 2 Black. 560, 17 L. ed. 265; *Doris* v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *United States* v. *Bank of Metropolis*, 15 Pet. 392, 10 L. ed. 774; *Sinking Fund Cases*, 99 U.S. 710, 25 L. ed. 496; *United States* v. *Barker*, 12 Wheat. 559, 6 L. ed. 728; *Cooke* v. *United States*, 91 U.S. 398, 23 L. ed. 237; *Duval* v. *United States*, 25 Ct. Cl. 60; *Hartson* v. *United States*, 21 Ct. Cl. 456. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of

> their authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any person or collection of persons, that difficulty is no reason for rejecting the operation of the principle, if the facts of the particular case will admit of its application.

The Walker case was affirmed by the Circuit Court of Appeals, *per curiam*, for the reasons given by the District Judge, 148 Fed. 1022.

There is no question here that the officers of the government concerned with the transaction involved in this case were acting, or failing to act, within the scope of their authority.

That it was anticipated that such questions as are presented here would arise in certain cases is indicated in Paragraph 21 of the policy issued to Mahar (R. 134), which reads, in part:

> "No person except the Director of the United States Veterans Bureau may waive forfeitures, or make, modify, or discharge contracts, or extend the time for paying a premium, or bind the United States by making any promise respecting any benefits hereunder."

By Section 5 of the World War Veterans Act, 1924, as amended, it is provided:

> "All officers and employees of the bureau shall perform such duties as may be assigned to them by the director. All official acts performed by such officers or employees specially designated therefor

by the director shall have the same force and effect as though performed by the director in person." §5, 43 Stat. 608.

The same officers approved the application for reinstatement, issued the policy, accepted the premiums, applied or failed to apply them, and failed to advise the insured as to the status of his insurance.

The Government having given its consent to be sued can claim no optional or selective immunity from the application of any one or another rule of law or equity. As the court further said in the *Walker* case, *supra,*

> "The sovereign has no prerogative to compel his courts to depart from the fixed principles of justice when he enters their portals to adjust his business transactions with his own citizens."

When the United States is a party litigant it assumes one of two characters. It appears either in the character of a sovereign or in the character of a contractor. *United States* v. *Warren Transportation Co., supra.*

In *McArthur Bros. Co.* v. *United States,* 258 U. S. 6, 42 Sup. Ct. Rep. 225, 66 L. ed. 433, 436, this court through Mr. Justice McKenna referred to a number of cases cited by appellants to show the liability of the United States under a contract made, it was alleged, as the result of misrepresentations by agents of the Government. "A systematic explanation of the cases," said the Court, "would extend this opinion to too great a length. They all declare the principle that the government will be liable in the same circumstances that private individuals would be liable, * * *."

Also:

United States v. *Smith,* 256 U. S. 11, 65 L. ed. 808 41 Sup. Ct. Rep. 413.
United States v. *Atlantic Dredging Co.,* 253 U. S. 1, 64 L. ed. 735, 40 Sup. Ct. Rep. 423.
United States v. *Spearin,* 248 U. S. 132, 63 L. ed. 166, 39 Sup. Ct. Rep. 59.
Christie v. *United States,* 237 U. S. 234, 59 L. ed. 933, 35 Sup. Ct. Rep. 565.
Hollerback v. *United States,* 233 U. S. 165, 58 L. ed. 898.

In *Jay Cooke, et al.,* v. *United States, supra,* this Court said:

> "Laches is not imputable to the government in its character as sovereign, by those subject to its dominion. *U. S.* v. *Kilpatrick,* 9 Wheat. 735; Gibbons v. *U. S.* 8 Wall. 269. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that governs individuals there. * * * As the Government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world."

The case of *The Falcon,* 19 Fed. (2d) 1009, involved the defense of laches in an admiralty suit instituted by the United States. The District Court for the District of Maryland said:

> "It is quite consistent with the general principle that the public interests shall not be prejudiced by

> the laches or negligence of public officers, that the United States, in its business relations with private citizens, be subject to the general rules of law. * * * There is no real distinction in principle between the duty of the United States to act with reasonable promptness, if it would keep alive its right against an offending vessel, and its duty as the holder of negotiable paper to preserve its right of action against an endorser by giving him timely notice. In the one case, as in the other, *the United States, having entered the field of private rights, must be bound by the established rules.*" (Italics ours.)

The court here cited in support of its reasoning, *Standard Oil Co.* v. *United States, supra,* and further said:

> "* * * Estoppels against the public are perhaps not as readily granted as against private individuals, but it has been decided frequently that the public may estop itself by acts done in its proprietary capacity."

In the case of *England National Bank* v. *United States,* 282 Fed. 121 (C.C.A. 8th), the court applied against the Government the familiar doctrine of banking law that a depositor to whom cancelled vouchers are returned must examine them within a reasonable time and notify the bank of any fraudulent or altered vouchers. As stated by the court, the rule is that the depositor's failure to do so amounts to "a conclusive admission of the correctness of the account and the legality and justice of the vouchers upon which the bank has a right to rely, and which the depositor may not consequently deny." In other words the rule is that of

estoppel, and the court deliberately applied the rule against the United States upon the reasoning of *Cooke* v. *United States, supra.*

In the case of *Ritter* v. *United States* the plaintiff failed to file a claim for a refund of an overpayment of income tax within the statutory period and pleaded that compliance was unnecessary because the Revenue Field Agent who had discovered the overpayment had assured him that a claim need not be filed and that the overpayment would be refunded as a matter of course. The court said, at page 267:

> "It is true, as plaintiff contends, that when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. *Walker* v. *United States,* (CC) 139 F. 409; *Cooke* v. *United States,* 91 U. S. 389, 23 L. ed. 237; *United States* v. *Flint,* 25 Fed. Cas. page 1107, No. 15121. The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority." *Ritter* v. *United States,* 28 Fed. (2d) 265.

III

UPON A GIVEN STATE OF FACTS ITS LIABILITY IS THE SAME AS THAT OF ANY OTHER INSURER. *HENCE IT IS ESTOPPED TO DENY PAYMENT OF THE INSURANCE IN THIS CASE BECAUSE OF THE CONDUCT OF ITS AGENTS.*

On the facts of this case the District Court in its Conclusions of Law said:

"That by its failure to explain its allocation of moneys paid, failure to give notice respecting future premiums, failure to return premiums and funds for many months after it now claims the policy had lapsed, and general failure to provide necessary information and explanation to the insured, the defendant has estopped itself from withholding payment because of the alleged lapse." R. 96, 97.

"Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it." *Mutual Life Ins. Co.* v. *Hurni,* 263 U. S. 167, 44 Sup. Ct. Rep. 90, 68 L. ed. 235, 237.

A review of the facts will, it is believed, establish the above proposition of law. As a veteran of the World War James Patrick Mahar was eligible to reinstate his war risk yearly renewable term insurance up to $10,000 and convert it into Government Life Insurance at any time up to and including July 2, 1927. Regulations of the Veterans Bureau set out the conditions for reinstatement and conversion. There has been some confusion as to the pertinent regulations, which are stated in respondent's brief in opposition to the petition for certiorari (Appendix, pp. 19-21) as Regulations No. 14 and 15, dated December 9, 1921. These regulations were amended July 1, 1926, and became §§4096, *et sequa.* The sections pertinent to this case are as follows:

Regulation No. 14, December 9, 1921, amended by Regulation No. 138; July 1, 1926.

Sec. 4096. In every case where reinstatement in whole or in part of lapsed or cancelled yearly renewable term insurance is desired under the provisions of Sec. 4112 hereof, and as a condition to reinstatement, the applicant shall make tender of a remittance payable to the Treasurer of the United States for an amount sufficient to cover two monthly premiums on the amount of yearly renewable term insurance to be reinstated—one for the grace period and the other for the current month. (July 2, 1926.)

Sec. 4097. The yearly renewable term insurance shall be reinstated effective from the first day of the month in which the requirements are complied with by the applicant, or (upon his written request made during such month) the first day of the following month.

Sec. 4110. In cases where the applicant desires to convert his lapsed or cancelled yearly renewable term insurance, under the provisions of Sec. 4112 hereof, and as a condition to reinstatement, he shall make tender of a remittance payable to the Treasurer of the United States for an amount sufficient to cover one premium (grace period) on the yearly renewable term insurance to be reinstated and converted, and at least one monthly premium on the converted insurance. (July 2, 1926).

Sec. 4112. Yearly renewable term insurance which has lapsed or has been cancelled may be reinstated, or reinstated and converted at any time on or before July 2, 1927, by the applicant making tender of the premiums as required in Sections 4096, 4110 and 4111, and under the following conditions: * * *.

The blank form supplied by the Bureau and used by Mahar did not provide for the conversion of yearly renewable term insurance into Government Life Insur-

ance (R. 156-158). It was captioned: "Application for reinstatement of yearly renewable term insurance" and was last revised in December, 1924. Therefore Mahar merely applied for the reinstatement of his term insurance in the amount of $5,000 (R. 157) and under Sec. 4096 of the Regulations, *supra,* was required to remit only two premiums on $5,000 term insurance, one for the grace period ($3.35) and one for the current month ($3.95).*

However, under the amendment of July 2, 1926, to the World War Veterans Act, 1924, no yearly renewable term insurance could be reinstated after July 2, 1927, and as the amendment of May 29, 1928, Title 38, U.S.C., c. 10, §512a, extending to all veterans of the World War the privilege of Government Life Insurance if they were in good health, had not yet been adopted, and as all term insurance not converted or matured, or otherwise protected, expired on July 2, 1927, the Bureau construed Mahar's application as being for simultaneous reinstatement of $5,000 of his term insurance and its conversion into Government Life Insurance. It is further noted that Mahar never specified any plan of Government Life Insurance to which his term insurance should be converted (Defendant's Exhibit No. 2, R. 156-158; Provisional Receipt, R. 156), but the Bureau assumed that he desired a "Five Year Convertible Term Policy," and later issued same (R. 118). It is believed the Bureau correctly interpreted

---

* Note. These requirements should not be confused with those applying to veterans not in good health, seeking reinstatement of their insurance under Section 304 of the World War Veterans Act, 1924, as amended July 2, 1926, c. 723, §15, 44 Stat. 799, (Appendix to respondent's brief, pp. 16, 17, and Regulation No. 15, pp. 20, 21, do.). They were required to pay all premiums in arrears with interest, or have same set up as a lien on the reinstated insurance.

Mahar's wishes in this respect though it never advised him of the situation, but when it came to the allocation of the remittance of $13.90 which accompanied the application, there is a wide divergence between his wishes and the disposition of the money.

Mahar was required under Section 4112 of the Regulations, *supra,* if the assumption as to his intent is correct, to forward only two premiums; the first, to cover the grace period on the $5,000 term insurance, to be reinstated, amounting to $3.35, and the second, one monthly premium on the converted insurance, which on the policy issued was fixed by the Bureau at $3.95, a total of $7.30. Where or from whom Mahar acquired his information as to payment of premiums is not known but either he was poorly advised or he made his own calculations erroneously for every item in his proposed allocation of the $13.90 remitted was wrong, according to the Bureau.

10. Premiums tendered with Application: (R. 158).

(a) For first month of lapse.....$6.70.
(Correct amount .....$3.35).

(b) For month of July, '27, reinstatement of Term Insurance $3.35*
(Should have been for premium on converted insurance.....$3.95).

(c) Advance premium on Term insurance, $5,000 .....$3.85**

---

* It is apparent that Mahar was ignorant of the fact that this premium was based upon his age at his birthday nearest to July 1, 1927, namely, August 28, 1927.

** This error was doubtless due to the fact that Mahar calculated the premium on his age at his last preceeding birthday, August 28, 1926, while the Bureau (R. 118) based its calculations on his age when the policy was issued. This was in September, 1927, and he had had another birthday on August 28, 1927.

(Should have been on Govt. Life Ins. $5,000.....Correct amount .....$3.95).

(d) For first payment on ($5,000 deleted) Government (converted) insurance..... $3.85 deleted).

Total $13.90

(Correct amount to cover above items .....$11.25).

From the foregoing it is evident that Mahar had remitted sufficient money to pay the premium on his term insurance for the grace period in 1919, to cover two premiums on his Government Life Insurance policy, and leave a balance of $2.65 in his favor. In his application Mahar had indicated his desire that the reinstatement should be effective "The first day of the month in which requirements have been complied with" (R. 157). This was in conformity with Sec. 4097 of the Regulations of the Bureau, *supra,* and when Mahar received his policy some time after September 19, 1927, the date of issue (R. 120), he had reason to believe that although it was stated therein that "This policy takes effect on the 1st day of July 1927" it really was not effective until September 1, 1927, as far as the payment of premiums was concerned, in view of his request as to the effective date.

In the case of *McMaster* v. *New York Life Ins. Co.,* the insured had taken out five policies of $1,000 each, and in each policy it was recited that it was made in consideration of the written application therefor, which was made part thereof, and of the payment in advance of an annual premium of $21, "and of the payment of a like sum on the 12th day of December in every year

thereafter during the continuance of this policy." The application fixed December 12, 1893, as the effective date of the policies, which, however, were not issued until December 18, 1893. A grace period of one month was allowed, and notwithstanding that on November 17, 1894, the company, as required by the New York statute, sent the insured notice of the coming due of the premiums as of December 12, 1894, and a representative of the company called upon the insured on December 11 or 12, 1894, to collect the premiums and he declined to make payment, this Court held the policies were not in force until December 18, 1893, and remained in force by reason of the grace period until January 18, 1895, on which day the insured died. The judgment of the Circuit Court of Appeals was reversed, as was the judgment of the Circuit Court, and the cause was remanded to the latter court with instructions to enter judgment for plaintiff *with interest and costs. McMaster* v. *New York Life Ins. Co.*, 183 U. S. 25, 46 L. ed. 64.

It is clear that the Bureau accepted Mahar's application for the reinstatement of his term insurance as including an application for its conversion into some form of Government Life Insurance; that it selected the form of policy into which the term insurance should be converted; that it fixed July 1, 1927, as the effective date of the policy though not issuing it until September 19, 1927; that it made an allocation of the remittance from Mahar to premiums entirely different from that proposed by him; and that it credited him with premiums on his converted insurance for July and August, leaving a balance of $2.65 on hand unapplied. It is further clear that while on or about August 1, 1927, it

communicated with Mahar (Plaintiff's exhibit No. 3, Provisional Receipt, R. 136), and again on or after September 19, 1927, when he was sent the policy of Government Life Insurance, the Bureau made no attempt whatever to inform him of the allocation of his remittance of $13.90, or of the status of his insurance, until some time in January, 1928, when he was advised that his policy had lapsed for his failure to pay the premium due September 1, 1927 (Plaintiff's exhibit No. 5, R. 140, 141, Form 772, sent by Bureau January 9, 1928, R. 169). In other words, the insured, although he lived to within a few days of six months after he remitted the $13.90 with his application, and more than three months after his policy was issued and received, never knew what disposition had been made of his remittance, or of the two subsequent remittances of $3.95 each, had no information that he was in arrears, and died believing his policy to be in full force and effect.

> "Any acts, declarations, or course of dealing by the insurers with knowledge of the facts constituting a breach of a condition in the policy, recognizing the policy as still in force and leading the assured to regard himself as still protected thereby, will amount to a waiver of the performance of the conditions of the policy, and will estop the company from setting up the same as a defense when sued for a subsequent loss." 14 R.C.L. 1182, citing *Viele* v. *Germania Ins. Co.,* 26 Ia. 9, 96 Am. Dec. 83, and note.

As a matter of fact the communication of January, 1928, gave no information as to the allocation of the $13.90 (R. 141). It refers to money "received" as $10.55, and states that the premiums due through Janu-

ary, 1928, amounted to $19.75, so the premium balance due was $9.20. As meanwhile there had been two remittances of $3.95 each the disposition of the $13.90 remained an enigma.

It was not until March 21, 1928, that the Veterans Bureau advised as to the allocation of the $13.90 (R. 145, 146) and those interested were for the first time informed how and why the Bureau arrived at the conclusion that the policy had lapsed for the non-payment of the premium due September 1, 1927. This correspondence was long after the death of the insured on December 24, 1927; nothing was said to him during his lifetime about the alleged lapsing of his policy although he lived nearly four months after the date of the alleged lapse. On or about November 2, 1927, the Bureau had received a remittance of $3.95 and another remittance of the same amount on or about December 20, 1927. Adding these amounts to the $13.90 it is clear the Bureau had in hand sufficient funds to cover the premium on the term insurance for the grace period, $3.35, and monthly premiums on the Government Life Insurance policy at $3.95 each, for July, August, September and October, 1927, with a balance to the credit of the insured of $2.65. The policy matured October 17, 1927, when the insured became totally and permanently disabled (R. 94) after which no more premiums were required. As the latter date was within the grace period from September 1, 1927, it was immaterial whether the premium for October 1, 1927, was paid or not. Thus we find that on September 1, 1927, the insured had a credit of $2.65, followed by two remittances of $3.95 each, or a total credit of $10.55 against the premium of $3.95 due September 1, 1927. No effort was

made to return this money or any part thereof during the lifetime of the insured (Findings of fact, R. 96), or to communicate with him concerning it, and as far as the record shows it is still on deposit in the Government Life Insurance Fund.

In the case of the *Phoenix Mutual Life Insurance Company* v. *Doster,* 106 U. S. 30, 27 L. ed. 65, exception was taken to the charge of the trial court. In his summary of the charge Mr. Justice Harlan said:

> "It said, in substance, that if the conduct of the company in dealing with the insured and others similarly situated had been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid at that day, would not be enforced if payment were made within a reasonable time thereafter, the Company ought not, in common justice, to be permitted to allege such forfeiture against one who acted upon that belief, and subsequently made or tendered the payment; and that if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly *or by receiving and retaining the premiums, with full knowledge of the circumstances,* the same consequences should follow." (Italics supplied.)

See also *New York Life Ins. Co.* v. *Dumler,* 282 Fed. 969 (C.C.A. 5th).
Brooklyn Life Insurance Co. v. *Miller,* 12 Wall. 285, 20 L. ed. 398.

It is significant that although, if the policy had lapsed for the non-payment of the premium due September 1, 1927, that fact was known to the Bureau on October 2, 1927, at the latest, no attempt was made to notify Mahar

until January, 1928, when, of course, it was too late for him to do anything about it as he was dead. If he had been advised when his policy was sent to him that he should remit an additional $1.30 to cover the premium for that month is there any doubt but that he would have done so? Should the Bureau have sent him the policy at all until the premium for September was paid, or without notifying him that it had not been paid? He had remitted a premium for July, 1927, and an "Advance premium on Term insurance." Receiving the policy in September he had a right, in the absence of information to the contrary, to believe that his remittance covered the premium due that month. As a matter of fact, it was not until January, 1928, that the Bureau worked out any allocation of the remittance of $13.90 and arrived at the conclusion that the policy had lapsed (R. 140, 169), and the receipt of the second $3.95 was not entered until January 27, 1928.

In *New York Life Insurance Co.* v. *Eggleston,* 96 U. S. 572, 24 L. ed. 841, 842, the chief element of estoppel was failure, as found by the jury, to give sufficient notice where the premium was to be paid. This Court pointed out that "we are dealing with the question of forfeiture for not paying at the very day * * *," and said:

> "We have recently, in the case of *Insurance Co.* v. *Norton,* shown that forfeitures are not favored in the law; and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, *or course of action,* on the part of an insurance company, which leads a party insured honestly to believe that by conforming

thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture." (Italics ours.)

In respondent's brief in opposition to certiorari at page 6 it is argued that the policy contained a provision that the monthly premium was $3.95 thus indicating to the veteran the mistake in his proposed allocation, and on page 8 it is maintained that no effort was made to reinstate the policy "and even if reinstatement had been sought after October 2, 1927, the state of the veteran's health would have precluded compliance with the conditions of the policy in that regard."

In view of the fact that it took the experts of the Bureau, who made the final allocation of the $13.90 and who passed upon the application and issued the policy, until January 9, 1928—to reach the conclusion that the premium due September 1, 1927, had not been paid and the insurance was therefore forfeited, it is rather harsh to charge Mahar with that knowledge back in September, in the absence of any information as to the disposition made of his $13.90. He certainly is to be credited with an attempt to keep his policy in force.

A case in which certain circumstances are similar to those of the case at bar is that of *The Hartford Life and Annuity Insurance Co.* v. *Unsell,* 144 U. S. 439, 36 L. ed. 496. In that case the statement by Mr. Justice Harlan shows that the insured, who was the husband of the plaintiff, had failed to pay the monthly dues for January, 1886, on or before the due date, January 1, 1886.

On January 21, 1886, the insurance company mailed a postal card calling attention to this fact, which was received on or about January 26, 1886. A health statement was called for to insure reinstatement. Mrs. Unsell, on January 28, 1886, mailed $5 dues for her husband's account, but paid no attention to the request for a health statement. The remittance was received on February 1, 1886, and the same day the company sent a reinstatement account again calling for a good health statement. But on January 31, 1886, the insured had died, and on being so informed the Insurance Company returned the remittance of January 28, attention being called to the lapse of membership as of January 1, 1886. Evidence was introduced to show the course of business between the assured and the company during the whole period covered by the certificates, in respect to the payment of dues after the date fixed in the contracts of insurance. The contracts contained the usual provisions as to the payment of dues and assessments and that they should become null and void if same were not paid on the due date. It does not appear that the Insurance Company was required to give notice of when the monthly dues were due, or to take other steps to collect them.

The defendant in the court below had excepted to the refusal of the court to grant certain instructions to the jury, and also to the charge as given. Much of the charge is set out in the opinion of this Court, which says that the law applicable to the case was stated to the jury with substantial accuracy. From the charge the following is quoted:

> "The question for you to consider and determine is whether, as a prudent business man, he had a

right to believe that it was immaterial whether he paid on the day or a few days later."

Referring to the charge the opinion says: "The charge was in entire consonance with the settled doctrines of this court as established in the cases to which we have adverted," and the judgment in favor of the plaintiff was affirmed.

In the case at bar the insured had made a remittance with his application, admittedly more than sufficient to pay premiums for more than three months including the premium due on the lapsed term policy. Two subsequent remittances were made, and he died almost six months after reinstating his insurance without an intimation of any kind that he was behind in his premium payments. We reiterate that he died believing, and having every right to believe, that his policy was in full force and effect, and that he had paid his premiums as they fell due.

IV

INTEREST SHOULD BE ALLOWED

In the District Court petitioner asked that interest be allowed from December 24, 1927, and costs (R. 8), but no provision for interest or costs was made in the judgment nor was there any reference thereto in the conclusions of law by the District Court or in its opinion. It is assumed that all concerned were under the impression that the question had been determined by this Court in its answer to the third and fourth questions certified in the case of *United States* v. *Worley,* 281 U. S. 339, 50 Sup. Ct. Rep. 291, 74 L. ed. 887, and *Jackson* v. *United States,* 281 U. S. 344, 345, 74 L. ed. 891, decided the same day.

The attention of the Court is respectfully invited to the fact that the *Worley* and *Jackson* cases involved claims against the United States upon contracts of *yearly renewable term insurance,* and that if interest and costs had been allowed in these and similar cases, same would have been paid by the United States. In the case at bar the claim is on a contract of Government Life Insurance and against the Government Life Insurance Fund to which the United States has contributed nothing, and it is believed the question of interest is controlled by *Standard Oil Co. of N. J.* v. *United States, supra.* See also *McMaster* v. *New York Life Ins. Co., supra.*

The only case in which, as far as counsel is advised, interest was allowed where recovery was made by suit upon a policy of "converted" or Government Life Insurance, was that of *Wilkinson* v. *United States,* 37 Fed. (2d) 918 (D. C. W. D. S. C.). In the *Wilkinson* case, which was coupled with *Shealy* v. *United States,* and *Siebert* v. *United States,* which were suits for war risk yearly renewable term insurance, the court in the opinion said:

> "Where, however, under statutory authority the government has entered into the business of insuring life or property, for a monetary consideration and has issued insurance policies or contracted to do so in the method and substantially the form adopted by business corporations, and has by such policies contracted to pay a sum certain upon the happening of a determined or determinable date, interest will accrue upon the amount so designated from the due date as in other business transactions founded on contract; such cases being governed by the commercial character of the obligor, whose

sovereign immunity has been waived because of statutory authority to sue."

There seems to be no good reason why the Government Life Insurance Fund, which is made up of contributions by the policy-holders, interest upon investments of such contributions, and the withholding of dividends from the policy-holders, should profit to the extent of the interest properly due this estate. It has been seven years since the policy matured and the interest upon the principal sum of $5,000 at 6% per annum would amount to $2,100. Meanwhile this $5,000 has been put out at interest for the benefit of the Fund.

It is believed the widow and children of the insured are more entitled to this interest than the Government Life Insurance Fund, and they are much less able to bear the costs of this litigation.

CONCLUSION

For the reasons set forth petitioner believes this Court should reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court, with an allowance of interest and costs.

WILLIAM WOLFF SMITH,
1901 Wyoming Ave. N.W.,
Washington, D. C.
Counsel for Petitioner.

FRANK C. HUNTINGTON, ESQ.,
241 Main Street
Oneonta, New York.
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	8
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Birmingham v. *United States*, 4 F. (2d) 508	11
Crawford v. *United States*, 40 F. (2d) 199	11
Hart v. *United States*, 95 U.S. 316	11
Jackson v. *United States*, 24 F. (2d) 981	12
Lee v. *Munroe*, 7 Cranch 366	11
Raives v. *Raives*, 54 F. (2d) 267	11
United States v. *Loveland*, 25 F. (2d) 447, error confessed, 278 U.S. 665	12
United States v. *Worley*, 281 U.S. 339	9
Statutes:	
Act of June 7, 1924, c. 320, 43 Stat. 607, 608, 612, 625, 626:	
Sec. 5	13
Sec. 17	13
Sec. 300	14
Sec. 302	15
Sec. 306	17
Act of June 2, 1926, c. 449, Sec. 301, 44 Stat. 686	15
Act of July 2, 1926, c. 723, 44 Stat. 790, 792, 800:	
Sec. 28	14
Sec. 304	16
Sec. 308	18
Miscellaneous:	
Regulation No. 14, Veterans' Bureau, Dec. 9, 1921	19
Regulation No. 15, Veterans' Bureau, Dec. 9, 1921	20

81564—34——1

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 210

THE WILBER NATIONAL BANK OF ONEONTA, NEW YORK, as Administrator of the Estate of James Patrick Mahar, Deceased, petitioner

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is contained in the record (R. 88–92). The opinion of the Circuit Court of Appeals is reported in 69 F. (2d) 526 (R. 179–182).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934 (R. 182). The petition for writ of certiorari was filed July 21, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

May any officer or agent of the United States by his conduct waive, or estop the United States to deny, compliance by a holder of a Government life-insurance policy with duly authorized Regulations of the Veterans' Bureau and provisions of the policy governing lapse of such insurance for non-payment of premium on time and reinstatement thereafter?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 13–21.

STATEMENT

This suit was instituted in the District Court for the Northern District of New York on April 17, 1930, by the petitioner herein as administrator of the estate of James Patrick Mahar, deceased, seeking to recover benefits under a contract of United States Government life insurance issued to the plaintiff's decedent, hereinafter called the veteran. Judgment for the plaintiff was reversed by the Circuit Court of Appeals for the Second Circuit and the plaintiff now seeks a writ of certiorari.

In its petition filed in the District Court the plaintiff alleged that the veteran was issued a policy of war-risk insurance while in the Army during the World War and after his discharge al-

lowed it to lapse. That on or before July 1, 1927, he applied for reinstatement of a portion of the insurance and on September 19, 1927, a Government life-insurance policy in the sum of $5,000 was issued to him effective July 1, 1927. That the premium on a monthly basis was $3.95. That at the time of his application he paid the sum of $13.90 and received from the Government a receipt for that amount "in full payment of insurance premium due * * * from July 1, 1927 to October 1st, 1927." That all subsequent premiums were paid as they became due. That the veteran became permanently and totally disabled in September 1927, from a diseased growth involving the gall bladder, as the result of which he died December 24, 1927. That the plaintiff was duly issued letters of administration and has made due and timely proof to the defendant of the veteran's disability and death. It was further alleged that the defendant disagreed with the plaintiff as to its claim and refused to pay the same (R. 3–8).

The answer admitted the military service of the veteran, the issuance of war-risk term insurance during such service and the existence of a disagreement as to the plaintiff's claim. All other allegations in the petition were denied (R. 10–12).

The case was tried before a jury. At the close of the plaintiff's case the defendant moved for nonsuit on the ground that the plaintiff had failed to

prove the insurance policy matured by permanent and total disability or death prior to lapse (R. 78). This motion was denied with permission to renew it (R. 79). At the close of all the evidence the plaintiff moved for a directed verdict for the full amount of the policy and the defendant renewed its motion for non-suit. The motion was denied, an exception allowed and defendant thereupon moved for a directed verdict. The court then withdrew the case from the consideration of the jury (R. 87) and later delivered an opinion holding that the defendant was liable on the ground of estoppel (R. 88–92). The defendant thereupon tendered proposed findings of fact and conclusions of law. Some were approved and others refused (R. 98–101). The trial judge then made findings and conclusions of his own (R. 92–97) and entered judgment for the plaintiff accordingly (R. 106–108). To some of these findings exceptions were filed on behalf of the defendant (R. 102–104) and plaintiff (R. 105), respectively.

Upon an appeal duly perfected by the defendant (R. 108–117, 177–178) the judgment was reversed. The Circuit Court of Appeals for the Second Circuit held that by the terms of the policy and regulations the veteran's insurance lapsed prior to its alleged maturity for non-payment of the premium due September 1, 1927; and that no conduct on the part of the Veterans' Bureau or any other governmental agency could constitute a waiver of the

regulations and policy provisions or estop the Government to invoke them.

The uncontradicted evidence showed the following facts:

The veteran during military service had obtained a $10,000 contract of war-risk term insurance which lapsed for non-payment of premium due August 1, 1919 (R. 145). On July 1, 1927 he submitted an application to reinstate $5,000 of this insurance and convert it to Government life insurance. He tendered in payment of premiums the sum of $13.90 proposing that it be allocated as follows (R. 158):

Premiums Tendered With Application:	
(*a*) For first month of lapse	$6.70
(*b*) For month of July '27, reinstatement of Term Insurance	3.35
(*c*) Advance premium on Term Insurance $5,000	3.85
(*d*) For first payment on ($5,000 deleted) Government (converted) insurance ($3.85 deleted)	
Total	13.90

The proposed allocation was in error. As the veteran was seeking to reinstate only half of the insurance originally held by him he was required to pay only half of the premium covering the first month of lapse. He apparently assumed that the full premium was due (R. 145–146). Moreover, the amounts designated to cover the July and August premiums on the converted policy were insufficient by the sum of 70¢. Correctly applied the sum tendered was sufficient to pay for the reinstatement and premiums on the converted policy for the

months of July and August leaving a balance to the veteran's credit of $2.65. The sum was so applied by the Veterans' Bureau. (Plaintiff's Exhibit 7—R. 145-147.)

Receipt of the remittance of $13.90 was acknowledged by a "provisional receipt" warning the veteran that the insurance applied for was to be effective provided reinstatement of the previous term insurance be approved by the Bureau, the proper amount be tendered to cover the premium, and the application determined to be acceptable to the Bureau. (Plaintiff's Exhibit 3—R. 136.)

Sometime shortly after the middle of September 1927 the veteran received a five-year convertible term policy of United States Government life insurance which showed on its face that it was issued September 19, 1927, effective July 1, 1927. (Plaintiff's Exhibit 1—R. 120.) It contained provisions to the effect that the monthly premium was $3.95 (thus indicating to the veteran the mistake made by him in his proposed allocation with reference to the amounts of premiums payable for the months of July and August (R. 118), and that unless this should be paid on the first of each month or within the grace period of thirty-one days the policy would become void and subject to reinstatement only upon evidence of insurability "satisfactory to the director of the United States Veterans' Bureau, and upon the payment of all premiums in arrears,

with interest * * *" (R. 121). The veteran, however, allowed his insurance to lapse for nonpayment of the premium due September 1st, made no inquiries of the Veterans' Bureau with reference to his insurance, and made no further remittances until November 2, after he had become ill. At that time his wife, under his direction, forwarded the sum of $3.95 (R. 22, 37) and on December 4 a similar remittance was made (R. 23, 38). Neither remittance was accompanied by an application for reinstatement or any notice of the fact that his condition had changed and that he was then in poor health. The trial court found that the veteran became totally and permanently disabled on October 17, 1927, and that he died December 24, 1927 (R. 94). In January 1928, still in ignorance of his illness and death, the Veterans' Bureau addressed a letter to him acknowledging receipt of a remittance of $3.95 tendered in payment of the September premium and advising that as it had not been sent until after the expiration of the grace period it could not be accepted in payment of the premium until the insurance had been reinstated. A form of application for reinstatement and directions concerning the same were also enclosed, together with a statement showing the amount already received and the balance due to carry his insurance through the month of January 1928 (R. 28, 140–143).

81564—34——2

ARGUMENT

It is indisputable and seems to be conceded that under the terms of the veteran's policy of insurance and the Regulations of the Veterans' Bureau his insurance expired October 2, 1927, for failure to pay the premium due September 1 within the grace period of thirty-one days. (*Infra* pp. 19–20, R. 120–121.) No effort was made to reinstate the policy, and even if reinstatement had been sought after October 2 the state of the veteran's health would have precluded compliance with the conditions of the policy in that regard.

The petitioner, however, contends that the Government is estopped to invoke or has waived these provisions of the policy and Regulations by the failure of the Veterans' Bureau to notify the veteran in advance of the date when the September premium was due or to warn him thereafter that his policy had lapsed. It is claimed that the amounts tendered in November and December were sufficient to cover the premiums for the months of September and October; that in October the veteran became permanently and totally disabled, thereby maturing the policy, making disability benefits payable and relieving the insured from the necessity of making further payments; and that the Government is estopped to assert that the insurance was not in force on the date of alleged maturity.

The Government on the other hand contends that this Court has clearly indicated in its opinion

in *United States* v. *Worley*, 281 U.S. 339, that the ground upon which the petitioner bases his claim is untenable. What is there said of the Government's position as to yearly renewable term insurance provided in the Act of October 6, 1917 (40 Stat. 398), as distinguished from that assumed by it in undertaking marine insurance, is equally applicable to its position in issuing and administering Government life insurance. Referring to the statutory provisions for marine insurance it is said in the opinion (pp. 342–343):

> There was nothing in the statute to disclose an intention on the part of the United States to bear any part of the cost of the insurance or to give pecuniary aid to the owners of vessels or other property insured. And as a matter of fact a large profit resulted from the operation of the business. Annual Report of the Director of the U.S. Veterans' Bureau, 1923, p. 675.
>
> On the other hand, the Act of October 6, 1917, discloses a purpose on the part of the United States to protect those engaged in war service and their dependents and to contribute to their financial welfare. * * * The United States bore expenses of administration and excess mortality and disability cost resulting from the hazards of war. The insurance was limited to $10,000 and was made payable in 240 equal monthly installments; it was made not assignable nor subject to claims of creditors of the in-

> sured or of the beneficiary. The premiums were not adequate. The Congress intended that the United States should bear, and undoubtedly it has borne, a large part of the cost. Consequently the payments include both insurance and pension. *White* v. *United States,* 270 U.S. 175, 180.

The United States has undertaken to contribute heavily to the Government Life Insurance Fund and takes nothing in return. The petitioner attempts to dismiss the cost to the Government of administering the Fund as "a mere trifle" (Pet. Br. 16) but later directs attention to the fact that in 1933 more than half a million policies were in force amounting to well over two billion dollars in the aggregate, and that of late, at least, the number has been increasing every year (Pet. Br. 17). It is indeed difficult to understand how the cost of handling so vast an enterprise could be unsubstantial.

By far the greatest potential burden undertaken by the Government in this case, however, is the liability incurred for all benefits payable on account of death or disability from disease or injury "traceable to the extra hazard of the military or naval service." (Section 301, *infra,* p. 15.) None of this is paid from the Fund. Veterans who had maintained their yearly renewable term policies and those who were partially disabled from injury or disease suffered during the World War and had

reinstated their term insurance were eligible for Government life insurance without medical examination. (Sections 301, 304, *infra*, pp. 15, 16.) Moreover, all members of the military, naval, and reserve forces and of the Coast Guard are also eligible and many have obtained this insurance. It is only fair to assume that benefits for the deaths or disabilities of a substantial number of these policy holders are traceable to the extra hazards of military or naval service and hence are payable by the Government and not by the Fund. Thus, it is plain that far from stepping out of its capacity as a sovereign dispensing rewards for service, the United States has undertaken to contribute heavily to the financial welfare of the holders of Government life insurance. Its position in that respect is clearly distinguishable from the one occupied by it while engaging in marine insurance. The profits from that insurance were retained by the Government. All profits derived from Government life insurance belong to the policy holders. The Government gives much and takes nothing. Under the circumstances it cannot be assumed that the Government consented to waive its right as a sovereign to be exempted from estoppel by the omissions of its officers or agents. *Lee* v. *Munroe,* 7 Cranch 366, 369; *Hart* v. *United States,* 95 U.S. 316, 318; *Birmingham* v. *United States,* 4 F. (2d) 508 (C.C.A. 8th); *Crawford* v. *United States,* 40 F. (2d) 199 (C.C.A. 2d); *Raives* v. *Raives,* 54 F. (2d) 267

(C.C.A. 2d); *Jackson* v. *United States*, 24 F. (2d) 981 (D.C. Kans.), 34 F. (2d) 241 (C.C.A. 10th), 281 U.S. 344; *United States* v. *Loveland*, 25 F. (2d) 447 (C.C.A. 3rd) (error confessed for failure to file a written waiver of jury trial, 278 U.S. 665).

CONCLUSION

For the reasons stated we submit that the petition for certiorari should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.

FENDALL MARBURY,
Special Assistant to the Attorney General.

SEPTEMBER 1934.

APPENDIX

Pertinent Statutes and Regulations

The World War Veterans Act, of 1924, as amended prior to July 1, 1927, the effective date of the policy in this case, provides in part as follows:

> Sec. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, * * *. (June 7, 1924, c. 320, 43 Stat. 608.)
>
> Sec. 17. That all premiums paid on account of insurance converted under the provisions of Title III hereof shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance, including such liabilities as shall have been or shall hereafter be reduced to judgment in a district court of the United States or in the Supreme Court of the District of Columbia. Payments from this fund shall be made upon and in accordance with awards by the director.
>
> The bureau is authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial

principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insurance fund, or any part thereof, in interest-bearing oblibations of the United States or bonds of the Federal farm-loan banks and to sell said obligations of the United States or the bonds of the Federal farm-loan banks for the purposes of such fund (June 7, 1924, c. 320, 43 Stat. 612).

SEC. 28. There shall be no recovery of payments from any beneficiary who, in the judgment of the director, is without fault on his part, and where, in the judgment of the director, such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.

When under the provisions of this section the recovery of a payment made from the United States Government life insurance fund is waived, the United States Government life insurance fund shall be reimbursed for the amount involved from the current appropriation for military and naval insurance (July 2, 1926, c. 723, sec. 4, 44 Stat. 792).

SEC. 300. In order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department protection for themselves and their dependents, the United States, upon application to the bureau and without medical examination, shall grant United States Government life insurance (converted insurance) against the death or total permanent disability of any such person in any

multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided. * * *

The United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at 3½ per centum per annum. * * * (March 4, 1925, c. 553, sec. 12, 43 Stat. 1308.)

SEC. 301. Except as provided in the second paragraph of this section, not later than July 2, 1927, all term yearly renewable insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, and for reconversion of any such policies to a higher premium rate in accordance with regulations to be issued by the director, and *shall prescribe the time and method of payment of the premiums thereon,* but payments of premiums in advance shall not be required for periods of more than one month each, and may be deducted from the pay or deposit of the insured or be otherwise made at his election. * * * (Italics ours.) (June 2, 1926, c. 449, 44 Stat. 686.)

SEC. 302. Whenever benefits under United States Government life insurance (converted insurance) become, or have become, payable because of total permanent disabil-

ity of the insured or because of the death of the insured as a result of disease or injury *traceable to the extra hazard of the military or naval service,* as such hazard may be determined by the director, *the liability shall be borne by the United States,* and the director is hereby authorized and directed to transfer from the military and naval insurance appropriation to the United States Government life-insurance fund a sum which, together with the reserve of the policy at the time of maturity by total permanent disability or death, will equal the then value of such benefits. * * * (June 7, 1924, c. 320, 43 Stat. 625.) (Italics ours.)

SEC. 304. In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance, where the requirements as to the physical condition of

the applicant have not been complied with, or, for the reinstatement of the United States Government life insurance (converted insurance), the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum, compounded annually, on each premium from the date said premium is due by the terms of the policy: *Provided further,* That where within one year of this amendatory Act all of the requirements for reinstatement of yearly renewable term insurance under this section are complied with, except the payment of unpaid premiums with interest, and proof satisfactory to the director is furnished showing the applicant is unable to pay such premiums with interest or some part thereof, the application may be approved, and the amount of unpaid premiums with interest as provided in this section shall be placed as an interest-bearing indebtedness against the insurance, such indebtedness to bear interest at the rate of 5 per centum per annum, compounded annually, to be deducted in any settlement thereunder: *And provided further,* That no yearly renewable term insurance shall be reinstated after July 2, 1927. (July 2, 1926, c. 723, sec. 15, 44 Stat. 799.)

SEC. 306. The bureau is authorized to make provisions in accordance with regulations, whereby the payment of premiums on yearly renewable term insurance and United States Government life insurance (converted insurance) on the due date thereof may be waived and the insurance may be deemed not to lapse in the cases of the following persons, to wit: (a) Those who are

confined in hospital under said bureau for a compensable disability during the period while they are so confined; (b) those who are rated as temporarily totally disabled by reason of any injury or disease entitling them to compensation during the period of such total disability and while they are so rated; (c) those who, while mentally incompetent and for whom no legal guardian had been or has been appointed, allowed or may allow their insurance to lapse while such rating is effective during the period for which they have been or hereafter may be so rated, or until a guardian has notified the bureau of his qualification, but not later than six months after appointment as guardian, the waiver in such cases to be made without application and retroactive when necessary: * * * *And provided further,* That in the event any lien or other indebtedness established by this act exists against any policy of converted insurance in excess of the then cash surrender value thereof at the time of the termination of such policy of converted insurance for any reason other than by death or total permanent disability the director is hereby authorized to transfer and pay from the military or naval insurance appropriation to the United States Government life insurance fund a sum equal to the amount such lien or indebtedness exceeds the then cash surrender value. (June 7, 1924, c. 320, 43 Stat. 626.)

SEC. 308. Wherever yearly renewable term insurance or United States Government life (converted) insurance has heretofore lapsed for the nonpayment of premiums, and the insured has forwarded to the United States Veterans' Bureau, not later than the seventh day of the month following

the month for which the unpaid premium was due, an amount sufficient to reinstate the insurance under bureau regulations heretofore or hereafter issued, the director of the bureau is hereby authorized and directed to reinstate such insurance whenever it is shown to his satisfaction that the insured was at the time of the making of the remittance in the state of health required by bureau regulations. (July 2, 1926, c. 723, sec. 17, 44 Stat. 800.)

The following regulations of the Veterans' Administration were in force and effect on July 1, 1927, the effective date of the policy in this case:

Regulation No. 14, dated December 9, 1921, provides in part as follows:

1. *Due date of premiums.*—When any person insured under the provisions of the war risk insurance act leaves the active military or naval service the monthly premium which, had he remained in the service, would have been payable on the last day of the calendar month in which he was discharged, will be due and payable on the first day of the calendar month following the date of his discharge, and thereafter monthly premiums shall be due and payable on the first day of each calendar month.

2. *Premium pays for current month.*—The monthly premium so due and payable on the first day of the calendar month shall be deemed to carry such insurance for the then current calendar month. If any premium be not paid when due the insurance shall lapse and terminate as of that date except as hereinafter provided.

3. *Grace period.*—The premium due and payable on the first day of any calendar month, may, however, be paid thereafter at

any time within 31 days, excluding the first day of said month, which shall constitute a grace period for the payment of such premium. During such grace period the insurance shall remain in force but the unpaid premium shall be deducted from any settlement under the insurance on account of any claim arising during such grace period. If premium is not paid during the grace period, the effective date of lapse shall be the due date of the premium in default. * * *

Regulation No. 15, dated December 9, 1921, provides in part as follows:

1. Subject to the provisions of paragraph 3 of the present Government life insurance policy (quoted below) or a similar paragraph in any policy that may be issued hereafter under section 404 of the war risk insurance act or any amendment or supplement thereto, Government life (converted) insurance which has lapsed or may hereafter lapse, may be reinstated upon evidence of the insurability of the applicant satisfactory to the Director of the Veterans' Bureau and under the conditions stated in paragraphs 2, 3, 4, 5, and 6 hereof:

3. *Reinstatement.*—This policy, if it has not been surrendered for a cash surrender value, may be reinstated at any time after lapse upon evidence of the insurability of the insured satisfactory to the Veterans' Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, * * *.

2. Insurance may be reinstated: (a) Within three calendar months including the calendar month for which the unpaid premium was due, provided the applicant is in

as good health as he was at the due date of the premium in default; (b) after the expiration of the three calendar months mentioned in clause (a), provided the applicant is in good health.

* * * * *

6. The insurance shall not be deemed to be reinstated until satisfactory evidence of good health has been furnished and approved as required by this regulation and until all premiums in arrears have been paid with interest, * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1934

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Statement of facts	5
Argument	8
Conclusion	27
Appendix	28

CITATIONS

Cases:

Birmingham v. *United States*, 4 F. (2d) 508	17, 21
Brant v. *Virginia Coal & Iron Co.*, 93 U. S. 326	11
Bratton v. *Chandler*, 260 U. S. 110	25
Caha v. *United States*, 152 U. S. 211	17
Cooke v. *United States*, 91 U. S. 389	21
Cramer v. *United States*, 261 U. S. 219	27
Crary v. *Dye*, 208 U. S. 515	11
Dement v. *Rokker*, 126 Ill. 174	22
Filor v. *United States*, 9 Wall. 45	21
Floyd Acceptances, The, 7 Wall. 666	21, 22
Goldberg & Co. v. *City of Cedar Rapids*, 200 Ia. 139	22
Hawkins v. *United States*, 96 U. S. 689	21, 22
Insurance Co. v. *Wolff*, 95 U. S. 326	11
Kendall v. *United States*, 12 Pet. 524	19
Lee v. *Munroe*, 7 Cranch 366	21
Lynch v. *United States*, 292 U. S. 571	25
McCormick v. *Market Bank*, 165 U. S. 538	22
Maryland Casualty Co. v. *United States*, 251 U. S. 342	17
Mellon v. *United States*, 36 F. (2d) 609	19
New York Life Ins. Co. v. *Slocum*, 177 Fed. 842; 228 U. S. 364	11
Pine River Logging Co. v. *United States*, 186 U. S. 279	21
Smith v. *Stevens*, 10 Wall. 321	18
Sternfeld v. *United States*, 32 F. (2d) 789	17, 21
Sturm v. *Boker*, 150 U. S. 312	11
Sutliff v. *Lake County Commissioners*, 147 U. S. 230	22

Cases—Continued. Page

Sutton v. *United States*, 256 U. S. 575 21
Texas & Pacific Ry. v. *Pottorff*, 291 U. S. 245 22
Thompson v. *Sioux Falls National Bank*, 150 U. S. 231 11
Town of South Ottawa v. *Perkins*, 94 U. S. 260 22
United States v. *Jin Fuey Moy*, 241 U. S. 394 25
United States v. *Loveland*, 25 F. (2d) 447 (error confessed 278 U. S. 665) 21
United States v. *Worley*, 281 U. S. 339 24
Utah Power & Light Co. v. *United States*, 243 U. S. 389 ..... 21, 23
Whiteside v. *United States*, 93 U. S. 247 21
Wisconsin Central R'd. v. *United States*, 164 U. S. 190 22
Wood v. *United States*, 16 Pet. 341 18

Statutes:

Act of October 6, 1917, c. 105, 40 Stat. 398, 399, 400, 409, 410:
Sec. 13 28
Sec. 20 29
Sec. 400 29
Sec. 402 30
Sec. 403 30
Sec. 404 30
Act of August 9, 1921, c. 57, Sec. 409, 42 Stat. 147, 157 31
Act of December 24, 1919, c. 16, Sec. 18, 41 Stat. 371, 376 28
Act of June 7, 1924, c. 320, 43 Stat. 608, 612, 625, 626:
Sec. 5 32
Sec. 17 32
Sec. 302 34
Sec. 306 36
Act of March 4, 1925, c. 553, Sec. 300, 43 Stat. 1308 33
Act of June 2, 1926, c. 449, Sec. 301, 44 Stat. 686 34
Act of July 2, 1926, c. 723, 44 Stat. 790, 792, 799, 800:
Sec. 28 33
Sec. 304 35
Sec. 308 37

Miscellaneous:

V. A. Reg. No. 122, Oct. 28, 1925:
Sec. 5102 38
Sec. 5104 38
Sec. 5106 38
V. A. Reg. No. 138, July 1, 1926:
Sec. 4110 39
Sec. 4112 39
Bulletin No. 1, War Risk, October 15, 1917 16
H. R. No. 104, pp. 10–11, 67th Cong., 1st Sess 19
Sen. Rep. No. 231, p. 12, 67th Cong., 1st Sess 19

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 210

THE WILBER NATIONAL BANK OF ONEONTA, NEW YORK, as Administrator of the Estate of James Patrick Mahar, Deceased, petitioner

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 88–92) has not been reported. The opinion of the Circuit Court of Appeals is reported in 69 F. (2d) 526 (R. 179–182).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934 (R. 182). The time for filing a petition for a writ of certiorari was extended by a Justice of this Court on June 2, 1934, until August 1, 1934 (R. 184). The petition was filed July 21, 1934, and granted October 8, 1934.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Did the conduct of the officers or agents of the Veterans' Bureau either constitute a waiver of, or estop the United States to deny, compliance by the plaintiff's decedent, a holder of a policy of Government life insurance, with the duly authorized regulations of the Bureau and conditions in the policy providing for lapse of such insurance in the event of nonpayment of any premium on the due date and the conditions of reinstatement thereafter?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 28–40.

STATEMENT

This suit was instituted in the District Court for the Northern District of New York on April 17, 1930, by the petitioner herein as administrator of the estate of James Patrick Mahar, deceased, seeking to recover death benefits under a policy of United States Government life insurance issued to the plaintiff's decedent. Judgment for the plaintiff was reversed by the Circuit Court of Appeals for the Second Circuit and a writ of certiorari has been granted.

In its petition filed in the District Court the plaintiff alleged that the veteran was issued a

policy of war-risk insurance while in the Army during the World War, and after his discharge allowed it to lapse. That on or before July 1, 1927, he applied for reinstatement of a portion of the insurance, and on September 19, 1927, a Government life-insurance policy in the sum of $5,000 was issued to him, effective July 1, 1927. That the premium on a monthly basis was $3.95. That at the time of his application he paid the sum of $13.90 and received from the Government a receipt for that amount "in full payment of insurance premiums due * * * from July 1, 1927, to October 1, 1927." That all subsequent premiums were paid as they became due. That the veteran became permanently and totally disabled in September 1927 from a diseased growth involving the gall bladder, as the result of which he died December 24, 1927. That the plaintiff was duly issued letters of administration and has made due and timely proof to the defendant of the veteran's disability and death. It was further alleged that the defendant disagreed with the plaintiff as to its claim and refused to pay the same (R. 3–8).

The answer admitted the military service of the veteran, the issuance of insurance during such service and the existence of a disagreement as to the plaintiff's claim. All other allegations in the petition were denied (R. 10–12).

The case was tried before a jury. At the close of the plaintiff's case the defendant moved for nonsuit on the ground that the plaintiff had failed

to prove the insurance policy matured by permanent and total disability or death prior to lapse (R. 78). This motion was denied with permission to renew it (R. 79). At the close of all the evidence the plaintiff moved for a directed verdict for the full amount of the policy and the defendant renewed its motion for nonsuit. The motion was denied, an exception allowed and defendant thereupon moved for a directed verdict. The court then withdrew the case from the consideration of the jury (R. 87) and later delivered an opinion holding that the plaintiff was entitled to judgment on the ground that the defendant was estopped to assert that the policy lapsed for nonpayment of premiums The court stated that the rule as to estoppel of a private insurer is applicable to the Government (R. 88–92). The defendant thereupon tendered proposed findings of fact and conclusions of law. Some were approved and others refused (R. 98–101). The trial judge then made findings and conclusions of his own (R. 92–97) and entered judgment for the plaintiff (R. 106–108). To some of these findings exceptions were filed on behalf of the defendant (R. 102–104).

Upon an appeal duly perfected by the defendant (R. 108–117, 177–178) the judgment was reversed. The Circuit Court of Appeals for the Second Circuit held that by the terms of the policy and regulations the veteran's insurance lapsed prior to October 17, 1927 (the date the trial court found that the veteran became permanently and totally

disabled) for nonpayment of the premium due September 1, 1927, and that no conduct on the part of the Veterans' Bureau or any other governmental agency could constitute a waiver of the regulations and policy provisions or estop the Government to invoke them (R. 179–183).

The pertinent facts, as disclosed by the evidence, are as follows:

James Patrick Mahar, the plaintiff's decedent, was issued a policy of yearly renewable term insurance in the sum of $10,000 while in the Army of the United States during the World War. He allowed it to lapse for nonpayment of the premium due August 1, 1919 (R. 145). On July 1, 1927, he submitted to the Veterans' Bureau an application to reinstate $5,000 of this insurance requesting that the effective date thereof be "the first day of the month in which requirements have been complied with" (R. 157). Conversion was not mentioned. The application was accompanied by a remittance of $13.90 (R. 20, 135). In the application (Defendant's Exhibit 2, R. 156–165) the following allocation of the sum remitted appears over Mahar's signature (R. 158):

Premiums Tendered With Application:	
(a) For first month of lapse	$6.70
(b) For month of July '27, reinstatement of Term Insurance	3.35
(c) Advance premium on Term Insurance ,5,000	3.85
(d) For first payment on ($5,000 deleted) Government (converted) insurance ($3.85 deleted).	
Total	13.90

Soon after this application was sent, Mahar received a "Provisional Receipt" in which the receipt was acknowledged of the remittance "in connection with your application for *conversion* of term insurance into United States Government life insurance" (Italics ours). There was also a paragraph designated as "Important" in which the insured was advised that the insurance "shall be effective subject to the World War Veterans' Act, 1924, and Regulations, i. e., provided that previous term insurance be in force, or if lapsed, reinstatement thereof be approved by the Bureau; or if there be no previous term insurance that the applicant be entitled to Government Life Insurance; and that proper amount be tendered to cover the premium and that application be acceptable to the Bureau; otherwise the above remittance will be returned to the depositor." (Plaintiff's Exhibit 3, R. 136–137.)

Shortly after the middle of September the veteran received a five-year convertible term policy of Government life insurance which showed on its face that it was issued September 19, 1927, but effective July 1, 1927 (Plaintiff's Exhibit 1, R. 120). The trial court found that the date of issuance was "on or about September 19, 1927" (R. 94).

The policy contained provisions to the effect that the monthly premium was $3.95 (R. 118) and unless it should be paid on the first of each month or within the grace period of thirty-one days, the policy would become void and subject to reinstate-

ment only on evidence of insurability "satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest * * *" (R. 121). The widow testified that she had read the policy and noticed the provisions as to the payment of premiums (R. 36, 37). No inquiries of the Veterans' Bureau were made by or on behalf of the veteran as to the status of his insurance and no further remittances were made until November 2d, after he had become ill. At that time his wife, under his direction, forwarded the sum of $3.95 (R. 22, 37) and on December 20th a similar remittance was made (R. 23, 38). Neither remittance was accompanied by an application for reinstatement or any notice of the fact that his condition had changed and that he was then in poor health. The trial court found that he became totally and permanently disabled on October 17, 1927, and that he died December 24, 1927 (R. 94).

In January 1928, still in ignorance of the veteran's illness and death, the Veterans' Bureau addressed a letter to him acknowledging receipt of a remittance of $3.95 tendered in payment of the September premium and advising that as it had not been sent until after the expiration of the grace period it could not be accepted in payment of the premium until the insurance had been reinstated. A form of application for reinstatement and directions concerning the same were also enclosed, together with a statement showing the amount

99659—34——2

already received and the balance due to carry his insurance through the month of January 1928, as follows (R. 141:)

Premiums through Jan. 1928	$19.75
Received	10.55
Premium Bal. Due	9.20

ARGUMENT

It is indisputable and seems to be conceded that under the terms of the veteran's policy of insurance and the Regulations of the Veterans' Bureau his insurance expired October 2, 1927, for failure to pay the premium due September 1st within the grace period of thirty-one days (Regulation 122, Secs. 5102 and 5104, *infra*, p. 38, Policy Art. 1, R. 120–121) and was not reinstated thereafter. The policy provided as conditions to reinstatement that there be " evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans' Bureau, and * * * payment of all premiums in arrears, with interest from their several due dates * * *" (R. 121). The Regulation of the Veterans' Bureau then in force (Regulation 122, Sec. 5106, *infra*, pp. 38–39) specified that to reinstate within three calendar months from the due date of the unpaid premium the applicant must be "in as good health as he was at the due date of the premium in default" and to reinstate thereafter he must be in good health and so state in his application, and also submit a report of a medical examination and such other evidence of insurability as may be required by the Director. The

sums tendered on behalf of Mahar in November and December, subsequent to the expiration of the grace period for the payment of premiums on his policy, were manifestly insufficent to have effected a reinstatement within the terms of the regulation and policy. Even if they had been sufficient in amount reinstatement could not have been effected since he made no application and the state of his health alone would have been sufficient to have prevented it.

The plaintiff, however, claims that the sums of money tendered on behalf of Mahar in November and December were sufficient to cover the premiums for the months of September and October; that he became permanently and totally disabled in October, according to the trial court's finding, thereby maturing the policy, making disability benefits payable and relieving him from the necessity of making further payments; and that the Government has waived or is estopped to invoke the provisions of the policy and regulations governing the timely payment of premium or reinstatement after lapse, by the conduct of the officers or agents of the Veterans Bureau in issuing the policy without advising him of the amount of money then due in order to keep his insurance in force. This, it is asserted, induced him to suppose that the sum remitted was sufficient to keep his insurance in force through the month of October, or that the regulations and policy provisions governing the time of payment of premiums or those relating to reinstatement, had been waived.

The Government, on the other hand, contends that an estoppel may not be invoked unless the party who asserts that he was misled by the conduct of the person sought to be estopped had a reasonable justification for relying thereon; that, under the circumstances, Mahar was not in fact justified in assuming that his remittance was sufficient to keep the insurance in force beyond the month of August or that provisions as to timely payment or reinstatement had been waived; that in any event the provisions of the insurance contract relating to the payment of premiums and reinstatement are fixed by statute and regulations which have the force of law; that waiver of these provisions by any officer or agent of the Veterans' Bureau is in effect prohibited by statute; and that as knowledge of the contents of such statutory provisions and regulations was imputed to the veteran as a matter of law, it may not successfully be maintained, for that reason alone, that he was misled by the conduct of officers or agents of the Veterans' Bureau.

The doctrine of waiver, as asserted against an insurer to avoid the strict enforcement of conditions contained in its policy "is only another name for the doctrine of estoppel" and can only be invoked where the conduct of its officers or agents has been such as to induce action by the insured in reliance upon it, and where it would operate as a fraud upon the insured if the insurer were afterwards allowed to disavow such conduct and enforce

the conditions of the policy. *Insurance Co.* v. *Wolff,* 95 U. S. 326, 333. Moreover, an estoppel may not be invoked in favor of one who may not assert that he has been misled, either because he knew the true state of facts (*Thompson* v. *Sioux Falls National Bank,* 150 U. S. 231, 244; *New York Life Ins. Co.* v. *Slocum,* 177 Fed. 842, 849, reversed on other grounds, 228 U. S. 364) or because the means of knowledge were convenient and available to him. *Brant* v. *Virginia Coal & Iron Co. et al.,* 93 U. S. 326, 337; *Sturm* v. *Boker,* 150 U. S. 312, 336; *Crary* v. *Dye,* 208 U. S. 515, 521.

A review of the evidence shows that Mahar knew or had convenient means of ascertaining after he received the policy in September that the sum remitted by him with the application in July was not sufficient to keep the insurance in force beyond October 1st.

It was provided by the statute (Section 301, *infra,* p. 34) that all yearly renewable term insurance should be converted into other forms of insurance not later than July 2, 1927. Consequently, if a veteran wished to reinstate and convert the insurance previously held by him it was necessary for him to do so on or before that day, tendering with his application a remittance of an amount sufficient to cover one monthly premium (for the grace period) on the amount of the term insurance reinstated and an amount sufficient to cover the first monthly premium on the converted insurance (Regulation 138, Sec. 4110, *infra,* p. 39).

Mahar's application, although filed one day before the expiration of the statutory time limit for reinstatement and conversion, sought only reinstatement of the yearly renewable term insurance formerly held by him. Conversion was not mentioned and evidently was not sought at that time. Apparently he proposed to reinstate $5,000 of his former insurance, to remit a sum sufficient to maintain it through the month of August and to convert it later. For in his application (R. 158) part of the sum of money remitted is allocated "For month of July '27, reinstatement of Term Insurance", and another for "Advance premium on Term Insurance $5,000." An additional sum of $3.85 originally inserted in an item designated "For first payment on * * * Government (converted) insurance" was deleted, thus indicating an original intention on his part to convert which was later abandoned for the time being. He allocated the sum of $6.70 "For the first month of lapse" apparently under the impression that he was required to pay a premium for that month on the full $10,000 of insurance previously held by him, whereas only half of that amount was required since only half of the original insurance was reinstated (R. 145–146).

Although Mahar's evident purpose to maintain a part of his original term insurance in force beyond July 2, 1927, could not be accomplished, it was evident that if he had known this he would in all probability have sought to convert as well as reinstate.

The Veterans' Bureau therefore ignored the defect in his application and issued to him the least expensive form of Government life insurance—a five-year convertible term policy which could be exchanged within five years without medical examination for another policy based on any plan of insurance issued by the Bureau at a higher rate of premium (Article 18 of the policy, R. 131). The sum remitted by Mahar was accordingly applied to the payment of the premium on $5,000 of yearly renewable term insurance for August 1919 (the first month of lapse), and the premiums for the months of July and August on the Government (converted) life-insurance policy, leaving a balance of $2.65 to Mahar's credit (Plaintiff's Exhibit 7, R. 145–146).

The fact that the policy was not issued until about two and one-half months after the application was made was no doubt due to the defect in the form of the application and the fact that it was one among 245,000 received by the Veterans' Bureau during the closing weeks prior to July 2, 1927, the last day for reinstatement and conversion.* In any event no prejudice resulted from the delay since the date of application (July 1, 1927) was the effective date of the insurance (R. 120) and shortly after the application was filed Mahar had received a provisional receipt indicating on its face that the application was being treated as one for conversion and that his insurance would be effective if he had complied with the statute and regulations (R. 136).

* Annual Report of the Director 1928.

It is true that Mahar was not advised as to the allocation of the $13.90 which accompanied his application, but it must have been apparent to him when he received the policy in September that it was insufficient to keep the insurance in force beyond the grace period for the payment of the premium due on the first of that month, and that if the full amount of such premium was not paid prior to the expiration of the grace period on October 1st his insurance would expire. He evidently knew that part of the sum remitted must necessarily have been applied to pay the premium for the first month of lapse of the original term insurance and the policy sent him provided that its effective date was July 1st (R. 120) and that "the payment of the monthly premium of $3.95 on the first day of each month" was required to keep the insurance in force. The petitioner contends that Mahar had reason to believe that his policy was not effective until September 1, 1927, from the fact that he indicated in his application that reinstatement should be effective "the first day of the month in which requirements have been complied with" (R. 157) and in spite of the statement in the policy that its effective date was July 1, 1927. It is submitted that these facts compel a contrary conclusion. The provisional receipt indicated by its contents that the Veterans' Bureau was treating his application as one for conversion as well as reinstatement and that the insurance would be effective if he had complied with the statute and

regulations. He therefore had every reason to believe when he received the policy that the insurance had been in effect since the date of the application, particularly since the policy so stated on its face.

It must have been evident to Mahar that after applying the sum of $11.95 necessary to pay the premiums for the months of July, August, and September, the balance of $2.05 was insufficient to pay the premium for the first month of lapse of his former insurance. His application indicates that at the time he made it he was under the impression that the sum of $6.70 was due for that purpose, an amount sufficient to pay the premium on the full $10,000 of insurance previously held by him. There appears to have been no justification for a later assumption on his part that less than half of that amount was sufficient, and if he remained under the same impression after the policy was issued he could only have concluded that the $13.90 was insufficient by $4.65 to reinstate, convert, and pay the premiums on the converted policy through the month of September; in other words, that it was insufficient even to cover the premium for August. In short, when he received the policy in the middle of September, Mahar may not have known, in fact, the exact amount of money which was then due to keep his insurance in force and might reasonably have supposed that it was greater than it actually was, but there was no justification whatever for an

assumption on his part that it was less. The policy showed on its face that the grace period would expire October 1st. Mahar had no reason to expect that the Veterans' Bureau would advise him further as to the status of his insurance before that date. They had not previously indicated in any manner that they would do so, and from the fact that the policy was issued only eleven days prior thereto it should have been evident that they would not. Obviously, therefore, the only course consistent with reasonable prudence would have been to remit the amount which he might reasonably have supposed to be then due and which would have been more than sufficient, unless more exact knowledge could have been obtained by inquiry.

But whatever Mahar knew or should have known in fact, full knowledge of the status of his insurance was imputed to him in law. Bulletin No. 1, issued October 15, 1917, by the Director of the Bureau of War Risk Insurance (predecessor of the Veterans' Bureau),[1] contains all the information necessary to determine the amount of the premium for the first month of lapse (required to be paid in order to reinstate yearly renewable term insurance). It provides that the insurance be issued "at monthly rates for the age (next birthday) of the insured when the insurance goes into effect increasing annually upon the anniversary of the policy to the rate for an age one year higher as per the following table

[1] Regulations and Procedure U. S. Veterans' Bureau, Pt. II, p. 1233, *et seq.* (U. S. Govt. Printing Office, 1930.)

of rates: (Then follows a table of rates of premiums to be paid at ages ranging from 15 to 65 for amounts of insurance ranging in multiples of 500 from $1,000 to $10,000.) The bulletin and Regulation 138 (*infra,* pp. 39–40), which provides the conditions of reinstatement and conversion, having been issued pursuant to statutory authority (War Risk Insurance Act, as amended October 6, 1917, Secs. 13 and 402 (*infra,* pp. 28, 30); World War Veterans' Act of June 7, 1924, Section 5 (*infra,* p. 32), have the force and effect of law (*Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 349; *Birmingham* v. *United States,* 4 F. (2d) 508, 510 (C. C. A. 8th); *Sternfeld* v. *United States,* 32 F. (2d) 789, 790 (N. D.–N. Y.) and cases cited) and are public records. Hence, notice of their contents is imputable to everyone. *Caha* v. *United States,* 152 U. S. 211, 222. There is therefore no ground in fact or in law for the petitioner's contention that Mahar was induced by the conduct of the Veterans' Bureau to suppose that the sum of money remitted with his application was sufficient to keep the insurance in force until the next remittance was made in November.

Similarly there is no merit in the petitioner's contention in the alternative that the payment of the premiums for the months of September and October was waived or that Mahar was justified in thinking so since no officer or agent of the Veterans' Bureau had the power to grant such a waiver, and of this he was chargeable with knowledge. The peti-

tioner directs attention (Br., p. 12) to a clause in Article 21 of the policy (R. 134) providing that "no person except the Director of the Veterans' Bureau may waive forfeitures, * * * or extend the time for paying the premium, * * *." That this clause may have intended to induce belief on the part of veterans that the Director possessed the authority to extend the time for the payment of the premiums is beside the point since everyone is chargeable with knowledge that no such authority existed in law.

An examination of the statutes and regulations in force at the time the policy was issued shows unmistakably that the Congress intended to prohibit the waiver of payment of a premium on its due date in cases like the one at bar.

By Section 13 of the War Risk Insurance Act, as amended October 6, 1917, *infra,* p. 28, the Director of the Bureau of War Risk Insurance was given (subject to the general direction of the Secretary of the Treasury) full power and authority to make rules and regulations, not inconsistent with the provisions of the Act, necessary or appropriate to carry out its purposes, and it was specifically provided in Section 404, *infra,* pp. 30, 31, thereof that such regulations shall prescribe the time and method of payment of the premiums on Government life insurance. In Section 409 of the War Risk Insurance Act, as amended August 9, 1921, *infra,* pp. 31–32, the Congress specifically designated certain classes of persons as to whom pay-

ment of premiums on the due dates might be waived, thus exhibiting an unmistakable intention to exclude all others. *Smith* v. *Stevens,* 10 Wall. 321; *Wood* v. *United States,* 16 Pet. 341, 363; *Kendall* v. *United States,* 12 Pet. 524, 650–651; *Mellon* v. *United States,* 36 F. (2d) 609, 610 (Ct. App. D. C.). The persons so designated were those (a) confined in a Government hospital or (b) rated as temporarily totally disabled by reason of an injury or disease entitling them to compensation. A similar provision was contained in Section 306 of the World War Veterans' Act, 1924, *infra,* pp. 36–37, in force at the time Mahar's policy was issued, adding as class (c) those who were mentally incompetent and without a legal guardian. Mahar manifestly was not a member of any of the classes specified. Obviously, any waiver of the payment of a premium on his policy on the date specified therein (R. 120–121) and in the regulation then in effect (Regulation 122, *infra,* p. 38) would have been contrary to the intention of the Congress as expressed in the statute and indicated by the Committee Reports, House Report No. 104, pp. 10–11 and Senate Report No. 231, p. 12, of the 67th Congress, First Session.

Equally manifest was the intent to forbid waiver of the provisions as to reinstatement. The only provisions of that character contained in a statute are to be found in Sections 304 and 308 of the World War Veterans' Act, *infra,* pp. 35, 36, 37. Section 304 provided for reinstatement of the insurance held by veterans who were partially disabled as the

result of an injury or disease suffered or contracted in the military or naval service during the World War. Section 308 required the Director to reinstate insurance if an amount sufficient to reinstate under the regulations were forwarded not later than the 7th day of the month following the one for which the unpaid premium was due and provided that it be shown to his satisfaction that the insured was at that time in the state of health required by the regulations. For the reasons already stated as to the provisions relating to the payment of premiums it is obvious that the Congress intended that the regulations and provisions of the policy as to reinstatement should not be waived except as indicated in these two sections of the statute. In this connection it might be well to add that any other construction of the statute would make these sections meaningless and furthermore would be contrary to the evident intention of Congress that the Director should not only promulgate regulations on the matters in question but should abide by the regulations so made until changed. For if authority existed to waive timely payment of premiums or the provisions as to reinstatement other than as indicated in the statute this would be tantamount to an authority to administer the insurance provided by the Act without regulation contrary to the evident purpose of Sections 5 and 301, *infra*, pp. 32, 34.

Since the Congressional intent to prohibit any waiver of the provisions in the regulations and policy as to the timely payment of premiums or re-

instatement after lapse was manifest in the statute and knowledge thereof was therefore imputed to Mahar, there is no possible ground for asserting that he was misled in that regard by the conduct of any of the officers or agents of the Veterans' Administration.

It is a well established rule that the United States is neither bound nor estopped by the acts or omissions of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Sutton* v. *United States,* 256 U. S. 575, 579; *Lee* v. *Munroe,* 7 Cranch 366, 369; *Filor* v. *United States,* 9 Wall. 45, 49; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 291; *Birmingham* v. *United States, supra; United States* v. *Loveland,* 25 F. (2d) 447 (C. C. A. 3d), (error confessed for failure to file a written waiver of jury trial, 278 U. S. 665); *Sternfeld* v. *United States, supra.* This rule applies as well to commercial enterprises or transactions in which the Government engages not in its capacity as a sovereign as to those in which it is acting in such capacity, *The Floyd Acceptances,* 7 Wall. 666, 682; *Cooke* v. *United States,* 91 U. S. 389, 401–402; and to conduct within as well as without the general scope of the authority of the officers or agents, *Whiteside* v. *United States,* 93 U. S. 247, 257; *Hawkins* v. *United States,* 96 U. S. 689, 691.

Petitioner contends that the status of the United States in suits against it on contracts of Govern-

ment life insurance is that of a mere trustee of the Government Life Insurance fund for the benefit of the policy holders and that hence it is not a real party in interest. Petitioner does not state what bearing his contention has upon the case at bar but perhaps it means to suggest that if its contention were correct the rule that the United States is not estopped by the acts or omissions of its agents contrary to law would not apply here. It is submitted that even were the United States not a real party in interest, the rule would nevertheless apply since it is founded not only upon public policy looking to the protection of public funds from collusion, but also upon the distinct ground that as the limits of the authority of public officers and agents are fixed by law, knowledge of such limits is imputed to everyone upon the theory fundamental in our system of Government that everyone is presumed to know the law. *The Floyd Acceptances, supra; Cooke* v. *United States, supra; Hawkins* v. *United States, supra; Wisconsin Central R'd* v. *United States,* 164 U. S. 190, 210–212; *Town of South Ottawa* v. *Perkins,* 94 U. S. 260, 262; *Sutliff* v. *Lake County Commissioners,* 147 U. S. 230; *Dement* v. *Rokker,* 126, Ill. 174, 199; *Goldberg & Co.* v. *City of Cedar Rapids,* 200 Ia. 139, 142. Upon the same ground it is held that a private corporation may not be estopped by acts of its officers or agents which are *ultra vires. McCormick* v. *Market Bank,* 165 U. S. 538, 550; *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 260. And so, in the case at bar, knowledge

was imputed to Mahar that the statute forbade the officers or agents of the Veterans' Bureau to waive the provisions of the regulation and policy as to the time for paying premiums or as to reinstatement after lapse. There is, therefore, no basis for contending that he was misled in that respect and no estoppel can arise against the Government on that score.

Even if Mahar were not chargeable with knowledge of the contents of the Regulations of the Veterans' Bureau and of the want of authority on the part of its officers to waive them for his benefit, petitioner nevertheless cannot recover, since the Government is here acting in its sovereign capacity and has a substantial pecuniary interest in the outcome of this case. It would therefore not be bound by the unauthorized acts or neglect of duty on the part of its officials. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409 (*supra*).

As has been pointed out in the brief in opposition, the Government makes substantial contributions to the Government Life Insurance fund and takes nothing in return. From the termination of the World War, when Government life insurance was first established (Section 404, *infra,* pp. 30–31), until the last day of December 1924, it has reimbursed the Fund for benefits paid on account of death or disability traceable to the extra hazards of military or naval service alone (Section 301, *infra* p. 34) in amounts which in the aggregate were more than half of the total of all

payments made from the Fund for disability and death during that period. Although the Government's contributions since then have diminished proportionately, they amounted to well over $7,000,000.00 in 1932. See Reports of the Administrator of Veterans' Affairs for 1932, p. 162; for 1933, p. 72. Manifestly, payments of benefits derived from such insurance "include both insurance and pension" and therefore the Government cannot be said to have stepped down from its position of sovereignty and entered the field of commerce. Hence it is not liable for interest on such benefits nor subject to any liabilities inconsistent with sovereignty. *United States* v. *Worley,* 281 U. S. 339, 343.

It is not to be inferred from the fact that the Government derives no financial benefit from Government life insurance that it lacks a substantial financial interest in defending suits on policies of such insurance. It is true that the statutes in force at the time the policy in this case was issued provided that "such liabilities as shall have been or shall hereafter be reduced to judgment" are payable from the Government Life Insurance Fund and that the Bureau is authorized to set aside from the fund "such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; * * *" (Section 17, *infra,* p. 32). However, an examination of the history of the statutes relating to this insurance shows conclusively that the United States from the begin-

ning has itself undertaken to be the insurer and has at no time attempted to shift its responsibility as such to the policyholders themselves. It is evident that the purpose of the creation of the Government Life Insurance Fund was administrative only. It had no more effect on the Government's liability incident to its undertaking as an insurer than would the creation of a similar fund have upon the liability of a commercial insurance company. That this was the intention of the Congress clearly appears from the fact that in the original Act providing for Government life insurance no provision was made for the creation of the Government Life Insurance Fund or any fund for such insurance separate and apart from the Military and Naval appropriation into which all premiums and from which all liabilities were paid whether from yearly renewable term or Government life insurance (Section 20 of War Risk Insurance Act, as amended Oct. 6, 1917, *infra,* p. 29). The Government Life Insurance Fund was not created until more than a year later by the Act of December 24, 1919 (Section 18, *infra,* p. 28). To construe this section as having the effect of transferring the obligations undertaken by the United States on its contracts of Government life insurance to the policyholders themselves would render this section unconstitutional on the ground that it would impair the contract rights of the policyholders in contravention of the Fifth Amendment. *Lynch* v. *United States,* 292 U. S. 571. It is a well-settled rule of this Court that such a con-

struction is to be avoided if fairly possible. *Bratton* v. *Chandler,* 260 U. S. 110, 114; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401.

It cannot, therefore, be a matter of doubt that the United States has a real pecuniary interest in defending this suit. In cases where the Government reimburses the Government Life Insurance Fund under Sections 28, 302, 304, and 306 of the statute (*infra,* pp. 33, 34, 35, 36, 37) its interest is obvious. But even in cases where there is no such reimbursement it is none the less real. Although it is provided that the Government Life Insurance Fund shall be administered in such a way as to be self-sustaining, if possible, the Government would be liable in the event of a deficiency. Moreover, it is by no means outside the realm of possibility that such a deficiency may occur even though the Fund be handled with the utmost prudence. A tremendous potential liability exists in the provisions for the payment of permanent total disability benefits. There is no age limit for the payment of such benefits, and the risk assumed for them is not reflected in the premium rate, since the basis for calculating it is limited by statute to the American Experience Table of Mortality and interest at 3½% per annum (Section 300, *infra,* p. 33).

It can scarcely be maintained that the Government has not a real pecuniary interest in any litigation affecting the Fund. Indeed, even were this not true, its interest as a sovereign in preserving the Fund for the benefit of the veterans and those

policy holders still in its service would, it is submitted, be sufficient alone to prevent impairment of their interests by an estoppel founded upon unauthorized conduct or neglect of duty on the part of Government officials over whom they have no control. *Cf. Cramer* v. *United States,* 261 U. S. 219, 234.

CONCLUSION

For the reasons stated it is respectfully submitted that this Court should affirm the judgment of the Circuit Court of Appeals.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
WILL G. BEARDSLEE,
Director Bureau of War Risk Litigation.
WILBUR C. PICKETT,
FENDALL MARBURY,
Special Assistants to the Attorney General.

DECEMBER 1934.

APPENDIX

PERTINENT STATUTES AND REGULATIONS

Pertinent sections of the War Risk Insurance Act, as amended, provide in part as follows:

> SEC. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * * (October 6, 1917, c. 105, 40 Stat. 398, 399).
>
> SEC. 18. That all premiums paid on account of insurance converted under the provisions of Article IV of the War Risk Insurance Act shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance. Payments from this fund shall be made upon and in accordance with awards by the director.
>
> The Bureau of War Risk Insurance is hereby authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insur-

ance fund, or any part thereof, in interest-bearing obligations of the United States and to sell the obligations for the purposes of the said fund (December 24, 1919, c. 16, 41 Stat. 371, 376).

SEC. 20. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of $23,000,000, to be known as the military and naval insurance appropriation. All premiums that may be collected for the insurance provided by the provisions of Article IV shall be deposited and covered into the Treasury to the credit of this appropriation.

Such sum, including all premium payments, is hereby made available for the payment of the liabilities of the United States incurred under contracts of insurance made under the provisions of Article IV. Payments from this appropriation shall be made upon and in accordance with awards by the director (October 6, 1917, c. 105, 40 Stat. 400).

SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided (October 6, 1917, c. 105, 40 Stat. 409).

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * * Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * * (October 6, 1917, c. 105, 40 Stat. 409, 410).

SEC. 403. That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum (October 6, 1917, c. 105, 40 Stat. 410).

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, and

into other usual forms of insurance, and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election (October 6, 1917, c. 105, 40 Stat. 410).

SEC. 409. The Veterans' Bureau is authorized to make provision in accordance with regulations whereby the payment of premiums on yearly renewable term insurance and United States Government life insurance (converted insurance) on the due date thereof may be waived and the insurance may be deemed not to lapse in the cases of the following persons, to wit: (a) Those who are confined in a hospital under said bureau for a compensable disability during the period while they are so confined; (b) those who are rated as temporarily totally disabled by reason of an injury or disease entitling them to compensation during the period of such total disability and while they are so rated: *Provided,* That such relief from payment of premiums on renewable term insurance on the due date thereof shall be for full calendar months, beginning with the month in which said confinement to hospital, or temporary total disability rating begins, and ending with that month during the half or major fraction of which the person is confined in hospital, or is rated as temporarily totally disabled: *Provided further,* That all premiums, the payment of which when due is waived as above provided, shall bear interest at the rate of 5 per centum per annum compounded annually from the due date of each premium, and if not paid by the

insured shall be deducted from the insurance when the same matures either because of permanent total disability or death (August 9, 1921, c. 57, 42 Stat. 147, 157).

The World War Veterans' Act, of 1924, as amended prior to July 1, 1927, the effective date of the policy in this case, provides in part, as follows:

SEC. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, * * * (June 7, 1924, c. 320, 43 Stat. 608).

SEC. 17. That all premiums paid on account of insurance converted under the provisions of Title III hereof shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance, including such liabilities as shall have been or shall hereafter be reduced to judgment in a district court of the United States or in the Supreme Court of the District of Columbia. Payments from this fund shall be made upon and in accordance with awards by the director.

The bureau is authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insurance fund, or any part thereof, in interest-bearing obligations of the United

States or bonds of the Federal farm-loan banks and to sell said obligations of the United States or the bonds of the Federal farm-loan banks for the purposes of such fund (June 7, 1924, c. 320, 43 Stat. 612).

SEC. 28. There shall be no recovery of payments from any beneficiary who, in the judgment of the director, is without fault on his part, and where, in the judgment of the director, such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.

When under the provisions of this section the recovery of a payment made from the United States Government life insurance fund is waived, the *United States Government life insurance fund shall be reimbursed for the amount involved from the current appropriation for military and naval insurance* (July 2, 1926, c. 723, sec. 4, 44 Stat. 792). (Italics ours.)

SEC. 300. In order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department protection for themselves and their dependents, the United States, upon application to the bureau and without medical examination, shall grant United States Government life insurance (converted insurance) against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided. * * *

* * * * *

The United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the haz-

ards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at 3½ per centum per annum. * * * (March 4, 1925, c. 553, 43 Stat. 1308, sec. 12). (Italics ours.)

SEC. 301. Except as provided in the second paragraph of this section, not later than July 2, 1927, all term yearly renewable insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, and for reconversion of any such policies to a higher premium rate in accordance with regulations to be issued by the director, and *shall prescribe the time and method of payment of the premiums thereon,* but payments of premiums in advance shall not be required for periods of more than one month each, and may be deducted from the pay or deposit of the insured or be otherwise made at his election. * * * (June 2, 1926, c. 449, 44 Stat. 686). (Italics ours.)

SEC. 302. Whenever benefits under United States Government life insurance (converted insurance) become, or have become, payable because of total permanent disability of the insured or because of the death of the insured as a result of disease or injury *traceable to the extra hazard of the military or naval service,* as such hazard may be determined by the director, *the liability shall be borne by the United States,* and the director is hereby authorized and

directed to transfer from the military and naval insurance appropriation to the United States Government life-insurance fund a sum which, together with the reserve of the policy at the time of maturity by total permanent disability or death, will equal the then value of such benefits. * * * (June 7, 1924, c. 320, 43 Stat. 625). (Italics ours.)

SEC. 304. In the event that all provisions of the rules and regulations *other than the requirements as to the physical condition of the applicant for insurance* have been complied with, an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicants' disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance, where the requirements as to the physical condition of the applicant have not been complied with, or, for the reinstatement of the United States Government life insurance (converted insurance), the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per an-

num, compounded annually, on each premium from the date said premium is due by the terms of the policy: *Provided further,* That where within one year of this amendatory Act all of the requirements for reinstatement of yearly renewable term insurance under this section are complied with, except the payment of unpaid premiums with interest, and proof satisfactory to the director is furnished showing the applicant is unable to pay such premiums with interest or some part thereof, the application may be approved, and the amount of unpaid premiums with interest as provided in this section shall be placed as an interest-bearing indebtedness against the insurance, such indebtedness to bear interest at the rate of 5 per centum per annum, compounded annually, to be deducted in any settlement thereunder: *And provided further,* That no yearly renewable term insurance shall be reinstated after July 2, 1927 (July 2, 1926, c. 723, 44 Stat. 799, Sec. 15). (Italics ours.)

SEC. 306. The bureau is authorized to make provisions in accordance with regulations, whereby the payment of premiums on yearly renewable term insurance and United States Government life insurance (converted insurance) on the due date thereof may be waived and the insurance may be deemed not to lapse in the cases of the following persons, to wit: (a) Those who are confined in hospital under said bureau for a compensable disability during the period while they are so confined; (b) those who are rated as temporarily totally disabled by reason of any injury or disease entitling them to compensation during the period of such total disability and while they are so rated; (c) those who, while mentally incompetent and for whom no legal guardian had been or has

been appointed, allowed or may allow their insurance to lapse while such rating is effective during the period for which they have been or hereafter may be so rated, or until a guardian has notified the bureau of his qualification, but not later than six months after appointment as guardian, the waiver in such cases to be made without application and retroactive when necessary: * * * *And provided further,* That in the event any lien or other indebtedness established by this Act exists against any policy of converted insurance in excess of the then cash surrender value thereof at the time of the termination of such policy of converted insurance for any reason other than by death or total permanent disability the *director is hereby authorized to transfer and pay from the military or naval insurance appropriation to the United States Government life insurance fund a sum equal to the amount such lien or indebtedness exceeds the then cash surrender value* (June 7, 1924, c. 320, 43 Stat. 626). (Italics ours.)

SEC. 308. Wherever yearly renewable term insurance or United States Government life (converted) insurance has heretofore lapsed for the nonpayment of premiums, and the insured has forwarded to the United States Veterans' Bureau, not later than the seventh day of the month following the month for which the unpaid premium was due, an amount sufficient to reinstate the insurance under bureau regulations heretofore or hereafter issued, the director of the bureau is hereby authorized and directed to reinstate such insurance whenever it is shown to his satisfaction that the insured was at the time of the making of the remittance in the state of health required by bureau regulations (July 2, 1926, c. 723, Sec. 17, 44 Stat. 800).

The following Regulations of the Veterans' Administration were in force and effect on July 1, 1927, the effective date of the policy in this case:

Regulation No. 122, dated October 28, 1925, provides in part as follows:

> SEC. 5102. *Premiums.*—United States Government life insurance is granted at the premium rate for the age nearest birthday anniversary of the applicant at the time the policy becomes effective. (Reference: Veterans' Bureau Form 740, entitled "Premium Rates and Policy Values.") Premiums are due and payable monthly in advance, but may be paid annually, semiannually, or quarterly in advance as provided by the terms and conditions of the policy contract (January 1, 1926).
>
> SEC. 5104. *Grace Period.*—The monthly premium when paid shall be deemed to carry such insurance in force for the then current calendar month. A grace period of 31 days, exclusive of the due date, will be allowed for payment of each monthly premium. If the insurance should mature during such grace period, it shall remain in force and the unpaid premium will be deducted from any settlement thereunder. If a premium is not paid during the grace period, the effective date of lapse shall be the due date of the premium in default (January 1, 1926).
>
> SEC. 5106. *Reinstatement.*—United States Government life insurance, if it has not been surrendered for a cash surrender value, may be reinstated at any time by the payment of all premiums in arrears with interest from their several due dates at the rate of 5 per centum per annum compounded annually, and the payment or reinstatement of any indebtedness which existed at the time of lapse,

in accordance with the terms and conditions of the policy contract, and under the following conditions:

A. Within three calendar months including the calendar month for which the unpaid premium was due, provided the applicant is in as good health as he was on the due date of the premium in default.

B. After the expiration of the period mentioned in class A of this section, provided the applicant is in good health and so states in his application, and submits a report of a complete medical examination and such other evidence relative to his physical and mental condition and insurability as may be required by the director, and on such forms as the director may prescribe (January 1, 1926).

Regulation No. 138, dated July 1, 1926, provides in part as follows:

SEC. 4110. In cases where the applicant desires to convert his lapsed or canceled yearly renewable term insurance, under the provisions of section 4112 hereof, and as a condition to reinstatement, he shall make tender of a remittance payable to the Treasurer of the United States for an amount sufficient to cover one premium (grace period) on the yearly renewable term insurance to be reinstated and converted, and at least one monthly premium on the converted insurance (July 2, 1926).

SEC. 4112. Yearly renewable term insurance which has lapsed or has been canceled may be reinstated or reinstated and converted at any time on or before June 2, 1927, by the applicant making tender of the premiums as required in sections 4096, 4110, and 4111, and upon compliance with the

requirements of this section 4112 and under the following conditions:

(a) Within three calendar months, including the calendar month for which the unpaid premium was due, provided the applicant is in as good health as he was on the due date of the premium in default and so states in his application.

(b) After the expiration of the period mentioned in clause (a) of this section, provided the applicant is in good health and so states in his application and submits a report of a complete medical examination and such other evidence relative to his physical and mental condition and insurability as may be required by the director and on such forms as the director may prescribe (July 2, 1926).

U. S. GOVERNMENT PRINTING OFFICE: 1934

8

CORRECTED COPY

p. 2

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1934.

The Wilber National Bank of Oneonta, New York, as Administrator of the Estate of James Patrick Mahar, Deceased, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 4, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

July 1, 1927, James Patrick Mahar applied to the United States Veteran's Bureau for reinstatement of $5,000 insurance upon his life, and with the application sent check for $13.90. The allocation of this sum then suggested by him gives no indication that he thought it sufficient to meet any premium due after August 1st.

September 19, a policy in the usual form issued and was delivered. It showed payment of the monthly premium—$3.95—due July 1st, and that like payment would be necessary on the first of each succeeding month. Also:

> ". . . This policy takes effect on the first day of July, nineteen hundred and twenty-seven. . . ."
>
> "Premiums are due and payable monthly in advance" and "if any premium be not paid when due, this policy shall cease and become void . . .", but that "a grace of thirty-one days without interest will be allowed during which time the policy will remain in force. . . . This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the insured satisfactory to the Director of the United States Veterans' Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest".

A letter dated July 29th acknowledging receipt of the check which accompanied the application contained the following clause:

> "Important.—Insurance under the application evidenced by the above remittance shall be effective subject to the World War Veterans' Act, 1924, and Regulations . . .".

Neither this letter nor any other notice informed the assured how the $13.90 had been allocated, but under the statute and regulations it sufficed to pay prescribed charges, and two premiums on the $5,000 policy—July 1st and August 1st; also $2.65 for credit on the premium due September 1st.

Two remittances of $3.95 by or for the assured were made to the Bureau November 2nd and December 20th respectively. These were retained, but were not acknowledged until after the assured's death. After issuance of the policy no notice was given the assured concerning payment of premiums, default, or that the policy had lapsed or was about to do so. Apparently the only communications sent prior to his death were the receipt of July 29th, and the policy, delivered September ~~19th~~. 1924.

Nothing indicates that the Bureau ordinarily sent notices concerning premiums or lapses. We are referred to no statute or regulation which required such a notice. No officer of the Bureau is shown to have had power to reinstate lapsed policies without evidence of insurability.

Mahar became totally incapacitated October 17th, but the Bureau had no notice of this fact. He died the twenty-fourth of December. Payment under the policy was refused upon the ground that it had lapsed because of failure to pay the premium due September 1st. The grace period ended October 2nd.

Petitioner, as administrator of the estate, brought this action in the District Court, Northern District, New York (Sec. 445, c. 10, Title 38, U. S. C. A.). He alleged issuance of the policy, that all matured premiums upon the policy had been duly paid, and asked recovery.

According to the provisions of the policy it expired October 2nd. But petitioner claimed, and the District Court ruled, that because the Bureau failed to give notice concerning allocation of the sum forwarded July 1st, failed to give notice of the due dates of the premium or that the policy had or was about to lapse, and retained

the two payments of $3.95 each, the United States were estopped to deny liability. It said:

> "If the defendant was a private insurance company, I would have no hesitancy in declaring it estopped from claiming the policy had lapsed for non-payment of premium. . . . The same principle should be applied against the defendant in this case. 'When the United States went into the insurance business, issued policies in familiar form, and provided that, in the case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business' ".

Judgment for the petitioner was reversed. The Circuit Court of Appeals held:

> "The conditions of the policy relating to premium payments were not met by payment of the premium due Sept. 1, 1927, and the insurance policy therefore expired, counting in the grace period, on October 2, 1927, unless there was a waiver by the appellee. The claim that there was such a waiver cannot be sustained. . . . The law does not permit waiving statutory requirements by the acts of employees of the government. The failure to pay the premiums prior to October 2 resulted in a lapse of the policy which may not now be held to be waived by the conduct of the government's employees".

The cause is here by certiorari granted upon an application which asserts that the questions presented are: First, whether the United States are engaged in the life and disability insurance business, and obligated to observe the same rules in respect of notices, applying premiums and obeying customs that are applicable to competing commercial companies, and Second, whether the United States, in the circumstances shown, are bound by the acts of their agents like other insurance companies and estopped to deny payments because of such acts.

Undoubtedly, the general rule is that the United States are neither bound nor estopped by the acts of their officers and agents in entering into an agreement or arrangement to do or cause to be done what the law does not sanction or permit. Also, those dealing with an agent of the United States must be held to have

had notice of the limitation of his authority. *Utah Power and Light Co.* v. *United States,* 243 U. S. 389, 409; *Sutton* v. *United States,* 256 U. S. 575, 579.

How far, if at all, these general rules are subject to modification where the United States enter into transactions commercial in nature (*Cooke* v. *United States,* 91 U. S. 389, 399; *White* v. *United States,* 270 U. S. 175, 180) we need not now inquire. The circumstances presented by this record do not show that the assured was deceived or misled to his detriment, or that he had adequate reason to suppose his contract would not be enforced or that the forfeiture provided for by the policy could be waived. *Insurance Co.* v. *Eggleston,* 96 U. S. 572; *Phoenix Insurance Co.* v. *Doster,* 106 U. S. 30. The grounds upon which estoppel or waiver are ordinarily predicated are not shown to exist.

The statutes and regulations which govern the War Risk Insurance Bureau we must assume are known by those who deal with it. When issuing a policy the Bureau, so far as shown, did not ordinarily notify the assured of the allocation of the cash payment; there was no custom to give notice of defaults. Here the insured had no right to expect such notices. His policy finally lapsed October 2nd. After that no officer of the Bureau had authority to reinstate it without proof of insurability. The policy so declared.

The assured's health began to decline in September and on October 17th he was permanently and totally disabled, but no notice of this was given. Payments of November 2nd and December 20th were sent when this disability existed. They were received by the Bureau when ignorant of the true situation, and at a time when reinstatement by affirmative action was inadmissible.

Nothing indicates intention by any officer or agent to vary the contract; and we find nothing done or omitted from which the assured or his representatives could reasonably imply such purpose or intent. The claim of estoppel or waiver is not supported by the facts shown and the questioned judgment must be affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.